89-70

Supreme Court, U.S.
FILED
JUL 17 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CARTER T.G. KUEHN,

Petitioner,

v.

COUNCIL No. 65, AMERICAN FEDERATION OF STATE, COUNTY, & MUNICIPAL EMPLOYEES, *et alia,*

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MINNESOTA *and* APPENDIX

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17 July 1989

QUESTIONS PRESENTED

I. Is Minnesota Statutes § 179A.06, subdivision 3 repugnant to the First and Fourteenth Amendments to the Constitution of the United States because it licenses respondent AFSCME Council 65, as petitioner's exclusive-bargaining representative, to collect from him a "fair-share fee" *without* supplying him with the *pre*-collection notice required by *Chicago Teachers Union, Local No. 1* v. *Hudson*, 475 U.S. 292 (1986)?

II. Is Minnesota Statutes § 179A.06, subdivision 3 repugnant to the First and Fourteenth Amendments to the Constitution of the United States because it licenses AFSCME Council 65 to include in its "fair-share-fee" assessment "*per capita* tax payments" to AFSCME Local 689A and AFSCME International on the theory that the three constitute an "integrated organization", notwithstanding that *only* Council 65 has been certified as petitioner's exclusive-bargaining representative, and that Council 65 produced *no* evidence before the appropriate Minnesota administrative agencies and courts that either Local 689A or AFSCME International provided "collective-bargaining" services to petitioner's bargaining-unit?

PARTIES TO THIS PROCEEDING

The parties to this proceeding include petitioner Carter T.G. Kuehn, and respondents Council 65, AFSCME; County of Crow Wing, Brainerd, Minnesota; and Minnesota Public Employment Relations Board, all of which were parties in the Court of Appeals of Minnesota.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MINNESOTA

INTRODUCTION

Carter T.G. Kuehn hereby petitions this Court to issue a writ of certiorari to the Court of Appeals of Minnesota to review that court's judgment in *Kuehn* v. *Council No. 65, AFSCME*, 435 N.W.2d 130 (1989).

OPINIONS BELOW

The opinion of the Court of Appeals of Minnesota which is the subject of this petition is reported at 435 N.W.2d 130, and is reprinted in the Appendix hereto (A.) at 2a. The underlying decisions of the Minnesota Bureau of Mediation Services (BMS) and Minnesota Public Employment Relations Board (PERB) are unre-

ported, and are reprinted in A. at 32a and 14a, respectively.

JURISDICTION

The Court of Appeals of Minnesota entered its opinion on 31 January 1989. The Supreme Court of Minnesota denied Kuehn's petition for review on 18 April 1989 (filed 19 April 1989). This Court has jurisdiction under 28 U.S.C. § 2101(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved in this petition include the First Amendment and Section 1 of the Fourteenth Amendment to the United States Constitution, and Minnesota Statutes § 179A.06, subdivision 3, the text of which is reprinted in A. at 43a.

STATEMENT OF THE FACTS

Petitioner Carter T.G. Kuehn is a nonunion employee of Crow Wing County, Minnesota, and a member of a collective-bargaining unit for which respondent Council 65, AFSCME, is the certified exclusive representative. Pursuant to Minnesota's "fair-share-fee" statute,[1] on 26 August 1986 Council 65 requested the county auditor to deduct from Kuehn's "earnings" a fee equal to 85% of the union's "regular membership dues", and "certif[ied] that affected employees ha[d] been served notice of the amount of this fee".[2] On 15 September 1986, Kuehn requested in writing that Council 65

[1] Minn. Stat. § 179A.06, subd. 3, *in* A. at 43a.

[2] A. at 44a.

> provid[e] a breakdown of the fiar [*sic*] share union dues I'm compelled to pay. Please deliniate [*sic*] what the dues I would pay would go for in as detailed a manner as possible.[3]

Council 65's Executive Director, Fred Argir, responded by letter dated 6 October 1986, stating that

> [w]e have examined the financial records of Local 689A, AFSCME Council 65, AFSCME International and the Minnesota AFL-CIO. Attached are financial reports from all the levels of the Union.[4]

These "financial reports" consisted of one sheet of paper for each "leve[l] of the Union", purporting (in the cases of Local 689A, Council 65, and the International) to break down expenditures into the categories "collective bargaining" (or "chargeable") and "non-collective bargaining", or (in the case of the Minnesota AFL-CIO) simply to state a "percent chargeable".[5] Although three of these sheets referred to "*Audited Expenses*" or some "Audited * * * Financial Statement" as the sources of the data used therein,[6] nothing in the package supplied by Argir purported to constitute a "verification by an independent auditor" of the "major categories of [union] expenses" supposedly allocated between the categories "collective bargaining" (CB) and "non-collective bargaining" (NCB).[7] Indeed, the package nowhere indicated that

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[3] *Id.* at 46a.

[4] *Id.* at 48a.

[5] *Id.* at 50a-54a. Council 65 later declined to press its claim for a "fair-share-fee" assessment on behalf of the Minnesota AFL-CIO.

[6] *Id.* at 50a, 51a, 54a.

[7] *See* Chicago Teachers Union, Local No. 1 v. Hudson, 475 U.S. 292, 307 n.18 (1986). Argir's letter used the accounting term of art "[w]e

(continued)

the allocations between CB and NCB expenses for the different "levels of the Union" had met *any* standard of review recognized in the accounting profession (be it an "examination", a "review", or a "compilation"),[8] or in some other way satisfied generally accepted accounting standards or procedures.

Moreover, the package contained

- no definitions of CB and NCB used by the various "levels of the Union" in preparing their different allocations of expenditures between the two categories (and *a fortiori* no legal or practical labor-relations rationales for such definitions);

- no disclosure of the methodologies of cost-ascertainment or cost-allocation for either of those categories;

- no statements of the other material factors and assumptions underlying the numerical conclusions set out in the package; and

- no descriptions of the specific activities performed by union officials or employees under such

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have *examined* the financial records". But Argir did not identify himself as a qualified accountant, let alone an "auditor" plausibly "independent" of Council 65 and its affiliates.

[8] *See, e.g.*, American Institute of Certified Public Accountants, *What Does A CPA Do? A Guide to CPA Services* (1986), at 9.

Moreover, Council 65's accountant, G.W. Paulson, candidly confessed that, in preparing Council 65's financial statements, he had *not* "intend[ed] * * * to give * * * any information on what Council 65 regards as its expenditures that could be included in a fair share fee calculation", and did *not* "have in mind as an objective that of accounting for expenditures that Council 65 regards as collective bargaining expenditures". Transcript of Hearing Before the Bureau of Mediation Services, Kuehn v. AFSCME Council No. 65, BMS Case No. 87-FSC-149, Vol. III, pp. 7-8, 17-20.

general line-item-budget entries as "salaries", "computer expense", "workshops", "legal expense", "legislative expense" (Council 65); "field services", "women's rights", "public policy", "public affairs" (AFSCME International); or "union administration" (Local 689A).[9]

The package did make clear, however, that Council 65 had included in the "fair-share-fee" assessment so-called "*per capita* taxes" paid to AFSCME International and the Minnesota AFL-CIO, and dues paid to Local 689A, even though (as Council 65 later conceded in testimony before the BMS) those entities were *not* certified as the exclusive representative for Kuehn's bargaining-unit.[10]

Unsatisfied, on 25 September 1986 Kuehn filed a challenge to the "fair-share-fee" assessment with the BMS. After evidentiary hearings, the BMS ruled in favor of Council 65. On the issue of whether "Council 65 provide[d Kuehn] with adequate and proper notice", the BMS ruled simply that

> [t]he October 6, 1986, notice [*i.e.*, the package supplied to Kuehn by Argir] * * * does comport with the statutory and [BMS] rule requirements and, thus, constitutes adequate notice.[11]

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[9] A. at 50a, 51a, 52a.

[10] Transcript, *ante* note 8, Vol. I, pp. 11-13, 51-55 (testimony of G.L. Johnson, Council 65 Staff Representative).

[11] A. at 33a, 36a. Minn. R. 5510.1410, subpart 1(D) requires that a notice of "fair-share-fee" assessment provide

> sufficient information to identify expenditures for benefits available to members of the exclusive representative and sufficient information to identify expenditures for collective bargaining and contract administration services that have been provided for bargaining unit employees without regard to membership status * * *.

On the issue of whether "per capita tax payments to AFSCME International and other affiliate bodies [may] be included in the base for calculating the * * * fair share fee", the BMS explained that it

> ha[d] previously determined that per capita tax payments to other levels of an *integrated* organization may be included in the base for determining an appropriate fair share fee * * * .
>
> The record in this case confirms that AFSCME is an *integrated* organization. The organizational bodies to which per capita taxes are paid provide services to the Council in fulfilling its collective bargaining and contract administration responsibilities.[12]

The BMS did *not* define what an "integrated" organization was for purposes of a "fair-share-fee" assessment; did *not* delineate why the supposed "integration" of an organization *only one* "level" of which had been certified as an exclusive representative apparently automatically entitled all the *other* "levels" *not* so certified to collect "*per capita* tax payments"; and did *not* describe what—because the record contained no evidence of any—"services to the Council in fulfilling its collective bargaining and contract administration responsibilities" *in Kuehn's bargaining-unit* the other "organizational bodies" provided, or how much those "services" (if any) cost.

Kuehn then appealed to the PERB, which affirmed the BMS on both issues. As to the adequacy *vel non* of Council 65's notice, the PERB held that the BMS's "rules do not require a C.P.A. verified breakdown of [union 'fair-share-fee'] expenditures", and that it "will not determine whether the [BMS's] rules meet the consti-

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[12] *Id.* (emphasis supplied).

tutional requirements".[13] On the matter of "*per capita* tax payments", PERB stated that

> [t]he record clearly establishes AFSCME is an *integrated* organization. The structure of AFSCME is composed of three parts; the International; the Council; and the Local. * * * Each level of AFSCME provides different services. The Councils are the intermediate level and provide *primary* services to Locals in the negotiation of contracts, handling of greivances [*sic*], participating in arbitration * * *. The International provides *back-up* services to Councils and Locals *upon request*. * * *
>
> The [PERB] finds AFSCME to be an *integrated* organization *and therefore* may appropriately include in the calculation of the base of the fair share fee assessment the "per capita" tax payments of the other levels of its organization.[14]

As did the BMS, the PERB did *not* define what an "integrated" organization was for purposes of a "fair-share-fee" assessment; did *not* delineate why the supposed "integration" of an organization one "level" of which had been certified as an exclusive representative "therefore" entitled all the other "levels" not so certified to collect "*per capita* tax payments"; and did *not* describe what "back-up services" (if any) "in the negotiation of contracts, handling of grievances, [or] participating in arbitration" either AFSCME International or Local 689A had provided, either directly or through Council 65, to Kuehn's bargaining-unit.

Kuehn then appealed to the Court of Appeals of Minnesota, which affirmed the PERB in all respects. The

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[13] *Id.* at 23a-24a, *citing* Minn. R. 5510.1410, subpart 1(D).

[14] A. at 21a-22a (emphasis supplied).

court held Council 65's "fair-share" notice "constitutional" because

> [t]he notice included Council 65 financial information from January 1, 1985 through December 31, 1985, AFSCME International financial information expenses for the fourth quarter of 1985, and financial information for Council 65. Each of these financial information sheets listed permissible and impermissible expenses.[15]

The court acknowledged that

> [t]he United States Supreme Court has *recommended* that a fair share fee notice include an independent auditor's verification of a union's expenditures so as to provide nonmembers with adequate information about the basis for the proportionate fee,[16]

but nevertheless upheld Council 65's notice—*which contained no independent auditor's verification*—on the theory that

> the [United States Supreme] Court did not require that an independent auditor categorize expenditures of the union as chargeable and nonchargeable. An independent auditor would be unfamiliar with the functioning of a union so that categorizing expenditures would be nearly impossible. Moreover, it is a union's responsibility to present its own categorization of expenditures, not the independent auditor's.[17]

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[15] 435 N.W.2d at 134.

[16] *Id.* at 135 (emphasis supplied), *citing* Hudson, 475 U.S. at 306.

[17] 435 N.W.2d at 135.

The Court of Appeals also affirmed the PERB's ruling on "*per capita* tax payments". The court acknowledged Kuehn's argument that

> he should not be required to pay fair share fees to organizations that are affiliated with his exclusive representative (Council 65) but are not *actually* his exclusive representative,

in the sense of providing demonstrable "collective-bargaining" services *to Kuehn's bargaining-unit*; but it held that the

> BMS found that the organizational bodies to which per capita tax payments are paid *may* provide services to Council 65 in fulfilling its collective bargaining and contract administration responsibilities. This finding is supported by the evidence. Based on this finding, BMS held that payments to other levels of an integrated organization may be included in the base for determining an appropriate fair share fee.[18]

However, the court did *not* refer to any "finding" of the BMS—or any evidence, for that matter—that "the organizational bodies to which per capita tax payments are paid" *did, in fact*, "provide services to Council 65 in fulfilling its * * * responsibilities" *to Kuehn*. Neither did the court supply any definition of an "integrated organization" that rationalized inclusion of "*per capita*" assessments "in the base for determining an appropriate fair share fee" where the "organizational bodies" *not* certified as the exclusive representative had proven *no* provision of services either directly to Kuehn or indirectly to him through the representative.

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[18] *Id.* at 135, 136 (emphasis supplied).

Kuehn then sought review by the Supreme Court of Minnesota, which declined to hear the case.[19]

This petition followed.

REASONS FOR GRANTING THE WRIT

A writ of certiorari is warranted here because the State of Minnesota has interpreted and applied its public-sector "fair-share-fee" statute in blatant contradiction of *Chicago Teachers Union, Local No. 1* v. *Hudson*.[20]

I. As applied in this case, Minnesota Statutes § 179A.06, subdivision 3 is repugnant to the First and Fourteenth Amendments to the United States Constitution, because it licenses Council 65 to collect a "fair-share fee" from Kuehn *without* supplying him with the *pre*-collection notice required by *Chicago Teachers Union, Local No. 1* v. *Hudson*.

Hudson unequivocally held that "the constitutional requirements for [a union's] collection of agency fees include an adequate explanation of the basis for the fee" set out in a *pre*-collection notice to nonunion employees, and explained that "adequate disclosure surely would include the major categories of [union] expenses [for 'collective-bargaining' purposes], as well as verification by an independent auditor".[21] In the context of *Hudson's* resounding rejection of the so-called "*residuum* theory" for calculating "fair-share fees",[22] establishing "the major catego-

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[19] A. at 1a.

[20] 475 U.S. 292 (1986).

[21] *Id.* at 310, 307 n.18.

[22] Under the "*residuum* theory"—which on its face Minn. Stat. § 179A.06, subd. 3 embodies in no uncertain terms—a union discloses only what it

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ries of expenses" logically demands identification and segregation of costs for specifically CB activities according to objective definitions of CB and a scientifically valid method of cost-ascertainment and -allocation. Here, Council 65's notice satisfied *none* of these constitutional requirements—but, according to the BMS, the PERB, and the Court of Appeals, it did not need to satisfy them to be "valid" under Minnesota Statutes § 179A.06, subdivision 3.

A. Contrary to the command of *Hudson*, Council 65's notice contains *no* "verification by an independent auditor" or "certified public accountant's verified breakdown of expenditures".[23] The materials in the notice refer cryptically to "audited expenses" or "audited financial statements" from which, assumedly, were derived certain figures which various unidentified individuals used in some unknown fashion to calculate "fair-share-fee" assessments for Council 65, Local 689A, and AFSCME International. However, these supposedly "audited" records were not attached to the notice. Neither was there any further "verification" of the "breakdown of expenditures" given in the notice itself—in terms of the overall results, the particular figures that the notice recites as constituting CB and NCB expenses, or the underlying methodol-

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is willing to admit are NCB costs (or costs of "members-only benefits"). These concededly NCB costs are then subtracted from regular membership dues, leaving a remainder (the "*residuum*") which is *conclusively presumed* to represent legitimate CB costs. No inquiry is made as to what the union's CB costs actually are (that is, as to the accuracy *vel non* of the "residuary" presumption). *Hudson* outlawed this procedure: "An acknowledgment that nonmembers would not be required to pay any part of 5% of the Union's total annual expenditures was not an adequate disclosure of the reasons why they were required to pay their share of 95%". 475 U.S. at 307 (footnote omitted).

[23] *Id.* at 307 n.18, 310.

ogy (unexplicated on the face of the notice) by which these figures were extracted from the undisclosed "audited" records and other sources.

Thus, even if the notice actually contained the appropriate categories of information *Hudson* mandated—including the specific activities claimed as CB, the definitions of CB used to identify those activities, and the method employed to allocate costs thereto—, the notice would nevertheless be constitutionally insufficient because it lacks *any* "verification by an independent auditor" of the actual calculation of the "fair-share fee" itself. Yet the Minnesota authorities have ruled Council 65's notice perfectly valid!

Lame, indeed, are the excuses for this defiant refusal to enforce a, perhaps *the*, major safeguard established in *Hudson*. The BMS upheld the notice simply because its own administrative "rule" requires no accountant's verification. The PERB affirmed the BMS on the authority of that "rule" and the PERB's unwillingness to question the "rule's" constitutionality. And the Court of Appeals sustained the PERB on the theory that an independent auditor's verification is unnecessary because

> [a]n independent auditor would be unfamiliar with the functioning of a union so that categorizing expenditures would be nearly impossible.[24]

The short answer to the BMS and PERB, of course, is that no state administrative "rule" can override or obviate a constitutional decision of this Court. And the somewhat longer rejoinders to the Court of Appeals are that, *first*, whoever originally "categoriz[es]" union expenditures as CB or NCB (that is, supplies the definitions of

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[24] A. at 35a-36a, 23a-24a, 11a.

those categories to apply to various activities of union personnel), an independent auditor can verify whether proper accounting procedures have been followed and standards met in identifying and allocating costs to those categories—just as auditors have always been able to verify cost-allocations to categories such as "salary", "travel", "office supplies", and so on which they do not themselves necessarily define in the first instance. *Second*, essentially unanimous *post-Hudson* authority rejects a "fair-share" notice predicated solely on "the union's conclusion as to the appropriate percentage of its budget expended on" CB activities.[25] Rather,

> [t]he accounting must clearly identify whether a particular major category of expense is, *in the auditor's view*, for * * * collective bargaining purposes.[26]

Indeed, the

> independent auditor must verify each major category in the union's budget * * * and indicate which categories comprise each component [*i.e.*, CB, NCB, and amounts reasonably in dispute].[27]

B. In addition to the lack of an independent auditor's verification, Council 65's notice is deficient because it fails to identify in any useful manner the *activities* of union personnel that it claims constitute CB services chargeable to Kuehn.

1. Even in the case of Council 65 itself, which at least is Kuehn's certified exclusive representative, the notice

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[25] Gilpin v. AFSCME, 643 F. Supp. 733, 737 (C.D. Ill. 1986), *rev'd on other grounds*, _____ F.2d _____ (7th Cir. 1989).

[26] Lowary v. Lexington Bd. of Educ., 127 L.R.R.M. 2223, 2234 (N.D. Ohio 1987) (emphasis supplied).

[27] Tierney v. City of Toledo, 824 F.2d 1497, 1504 (6th Cir. 1987).

simply lists various general budgetary line-items (such as "salaries", "benefits", "newspaper expense", "legal expense", and so on) under four CB and two NCB headings—with almost 94% of total expenditures being attributed vaguely to "union administrative expenses" and apparently deemed chargeable on that account.[28] Almost nowhere does the notice identify what was in fact done—in terms of patterns of behavior characterizable as CB—to incur these expenditures.[29] In several particulars, this absence of descriptive detail and allocation between CB and NCB condemns the notice as a matter of law.[30] But as a simple matter of fact, too, almost *every* entry in Council 65's notice still improperly "[l]eav[es] the non-union employees in the dark about the source of the figure for the agency fee" finally set down as chargeable.[31] For, on its face, Council 65's "financial information" patently fails to

> set forth the major categories of the union's budget expenses in a manner that enables the non-union objector to determine a proportion of his dues that relate to the costs of negotiating and administering the collective bargaining agreement * * * .[32]

In particular, Council 65 has not even attempted to "divid[e]" its "[r]elatively large expenditures * * * into

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[28] A. at 52a.

[29] *The only* clearly identified activity that is allocated to a undisputably CB category is "arbitration expense", which makes up slightly less than 2% of Council 65's total budget.

[30] *E.g.*, as to "newspaper expense" and "legal expense", which Council 65 allocates 100% to CB. *See* Ellis v. BRAC, 466 U.S. 435, 450-51, 453 (1984) (these expenses must be allocated, not charged 100% to nonunion employees).

[31] Hudson, 475 U.S. at 306.

[32] Lowary, 127 L.R.R.M. at 2235.

their component parts so as to demonstrate with specificity the nature of the expenditure".[33]

2. The portions of the notice directed to Local 689A and AFSCME International are no more illuminating. Almost 99% of the Local's supposedly chargeable expenditures are lumped, uninformatively, into the category "union administration expenses".[34] And AFSCME International's line-item budget merely lists general categories of expenses, not descriptions of activities that would allow a nonunion employee "to gauge the propriety of the union's fee".[35] Indeed, educated guesses as to what is going on suggest that the AFSCME portion of the fee is wildly excessive on its face.[36] But to ascertain the facts, nonunion employees such as Kuehn are unconstitutionally "requir[ed] * * * to object in order to receive information" that the notice withholds.[37]

C. The notice is further defective in that it articulates no *definitions* of CB activities that union personnel employed to categorize expenditures as chargeable *vel non.* Indeed, on its face the notice provides *no evidence whatsoever* that indicates, to any degree of reliability, that in any other than trivial instances Council 65 has

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[33] Gilpin, 643 F. Supp. at 737.

[34] A. at 52a.

[35] Hudson, 475 U.S. at 306.

[36] *E.g.*, AFSCME claims as CB costs chargeable to Kuehn's bargaining-unit $5,231,228 out of $5,247,796 for "field services". A. at 51a. As this category includes AFSCME *organizing* activities nationwide, all or most of it must be NCB. *See* Ellis, 466 U.S. at 451-53. Similarly, although AFSCME has allocated its "legal services" line-item, the very size of the figure claimed as CB ($410,734 out of $466,743), not to emphasize its vast disproportion to the "legal-expense" expenditures by Council 65 ($29,507), renders the allocation dubious.

[37] Hudson, 475 U.S. at 306.

allocated its and its affiliates' expenses according to legal—or even rational—standards of what constitutes "bargaining".[38] How, in this state of affairs, a nonunion employee can possibly "gauge the propriety of the union's fee" with respect to questionable categories such as "legislative expense" (Council 65) or "public affairs" (AFSCME International),[39] passes understanding.

Self-evidently, objective definitions of CB are crucial to implementation of the *Hudson pre*-collection disclosure scheme at every stage. Especially in any "verification by an independent auditor" preceding publication of the notice, CB definitions are *absolutely* necessary to arrive at *any* figures ultimately deemed (rightly or wrongly) to reflect CB costs. Moreover, if the definitions are *in*correct, but the auditor is *un*aware of that incorrectness, he can give an *un*qualified audit-opinion *even though that opinion does not and can not truly "verify" the result presented.* Furthermore, if the definitions used by the union and the auditor are misstated in the notice, or withheld in whole or in part, nonunion employees will thereby receive not only "inadequate" information,[40] but even *dis*information, to the extent that they rely on the auditor's verification as an imprimatur of legitimacy for the definitions.

In as much as: it was Council 65's responsibility, in the first instance in this case, to provide definitions of CB; there are, as yet, no generally accepted accounting standards as to CB costs on which Council 65 could implicitly

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[38] A "trivial instance" from a *definitional* perspective would include Council 65's allocation of "arbitration expense" to the CB column. The actual *amount* properly allocated to that category, however, might raise a complex problem from an *accounting* perspective.

[39] A. at 50a, 51a.

[40] Hudson, 475 U.S. at 306.

rely; there was *no* "verification by an independent auditor" of the notice; and the notice in fact expresses or refers to *no* definitions of CB which nonunion employees themselves could employ to attempt to assess the accuracy of the allocations after the fact—for all these reasons, the notice is fatally defective.

D. Although crucial, correct definitions of CB are not enough to satisfy *Hudson's* requirements. In addition, there must be a scientifically correct methodology to allocate costs to defined categories of activities; and "the union must inform the non-union employee as to * * * the method by which the fee was calculated".[41] Providing financial data collected through the use of such a procedure is the union's responsibility in the first instance. And the correctness of its chosen methodology is a key factor in the reliability of the overall "verification". For auditors can examine financial data generated and collected by various methods, and give unqualified opinions even if (unknown to them) the data derives from the union's use of an *in*correct methodology. Therefore, to a very large degree, the data-collection methodology *controls* the utility of any subsequent audit.

Here, Council 65's notice provides *no information whatsoever* concerning the method(s) of cost-allocation employed—although, obviously, radically different results are likely, if not certain, depending on whether (for example) a "direct-cost" or a "long-term-incremental-cost" method was used.

In sum, in every particular, Council 65's notice is palpably invalid under *Hudson*. That, nevertheless, every

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[41] Damiano v. Matish, 830 F.2d 1363, 1370 (6th Cir. 1987).

administrative and judicial authority of the State of Minnesota with jurisdiction in the premises has sustained the notice anyway points up the pressing need for this Court's review.

II. As applied in this case, Minnesota Statutes § 179A.06, subdivision 3 is repugnant to the First and Fourteenth Amendments to the United States Constitution, because it licenses Council 65 to include in its "fair-share-fee" assessment "*per capita* tax payments" to Local 689A and AFSCME International, on the theory that the three constitute an "integrated" organization, notwithstanding that *only* Council 65 has been certified as Kuehn's exclusive representative and that Council 65 produced *no* evidence that either Local 689A or AFSCME International provided "collective-bargaining" services to *Kuehn's* bargaining-unit.

Implicit in *Hudson's procedural* safeguards is a *substantive* guarantee: that nonunion employees will *not* be required to subsidize union activities that do not *benefit* them through the direct provision of CB services to *their* bargaining-unit.[42] One important purpose of a *Hudson pre*-collection notice, therefore, is to apprise nonunion employees of the chain of causation linking expenses that the union claims are CB in nature with the actual delivery of CB services to those employees. The BMS, the PERB, and the Court of Appeals, however, have licensed Council 65 to short-circuit this connection between procedure and substance through the theory that an "integrated" organization may assess as "fair-share fees" costs of "levels" of the organization that are *not* certified

[42] *Compare* Hudson, 475 U.S. at 306-07, *with* Ellis, 466 U.S. at 448, 451-53.

as the nonunion employees' exclusive representative and that have *not* proven their provision of any CB services to those employees' bargaining-unit.

The record in this case is stark:

- Council 65—*not* Local 689A or AFSCME International—is Kuehn's exclusive representative, uniquely required by statute to bargain collectively on his behalf and uniquely privileged to assess "fair-share fees" for the costs of *that* bargaining.[43]

- There is *no* evidence—on the face of the notice or elsewhere—that either Local 689A or AFSCME International has provided *any* identifiable CB service to Kuehn's bargaining-unit in particular (as opposed to other bargaining-units in Minnesota or throughout the United States).

- Council 65's notice nevertheless purports to assess "fair-share fees" equal to 99% of the Local's and 86% of the International's membership-dues. Included in this assessment, for example, is the absurdity that fully 100% of the International's expenditures for "research and collective bargaining" are allocable to Kuehn's fees,[44] even though no one imagines that 100%—or any known percentage, for that matter—of the International's activities properly characterizable as CB take place in or provide services to *Kuehn's* unit.

- Notwithstanding this, the BMS, the PERB, and the Court of Appeals have sustained these assess-

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[43] *See* Ellis, 466 U.S. at 448.

[44] A. at 51a.

> ments because of the alleged "integration" of the three entities—without explaining how "integration" justifies levying of fees *un*connected to the provision of any CB services to the fee-payer by the fee-collector.

In truth, "integration" is merely Minnesota's question-begging subterfuge to whitewash the forced subsidization by Kuehn and others like him of AFSCME as an organization without regard to the services it provides—or, more accurately, *fails* to provide—*to him*. Not being Kuehn's certified exclusive representative, Local 689A and AFSCME International have *no* legal right, privilege, or power to require him to accept CB services from them. As his exclusive representative, Council 65 does have such a right, and may choose to engage Local 689A or AFSCME International to deliver such services on its behalf. Under those conditions, Council 65 may properly assess a "fair-share fee" reflecting the costs of the services actually delivered to Kuehn by the other two entities. However, the propriety of the assessment in such a case would turn, not on the "integration" of the three entities, but rather on the *actual delivery* of chargeable CB services by two of them to the third, and through the intermediation of the third to the ultimate individual beneficiary, Kuehn. "Integration"—that is, the mutual interrelationships of the entities *other than* the provision of CB services *inter sese*—is simply irrelevant to the matter, just as "*non*-integration" would be beside the point were Council 65 to contract with some wholly nonunion third party to perform certain CB activities.[45]

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[45] Such as a private law firm engaged to handle employee grievances, arbitrate contract disputes, prosecute unfair-labor-practice charges, or defend the union in duty-of-fair-representation or invidious-discrimination cases.

As applied by the BMS, the PERB, and the Court of Appeals, Minnesota Statutes § 179A.06, subdivision 3 in effect embodies an illegal conclusive presumption that "levels" of an "integrated" organization, only one "level" of which is certified as an exclusive representative, may assess against nonunion employees in that "level's" bargaining-unit the CB expenditures of the other "levels" *no matter where or for what employees those expenditures were incurred, and in the clear absence of any competent proof that* any *services from the other "levels" were arguably delivered to the specific unit in question.*[46] The Minnesota "integration" theory thus purports to "overrule" *Hudson's* notice-requirement as to "integrated" affiliates of the actual exclusive representative—as blatantly evidenced in this case by the complete refusal of Council 65 even to suggest in its notice *how* 99% and 86%, respectively, of Local 689A's and AFSCME International's total dues were spent providing CB services to *Kuehn's* bargaining-unit.

CONCLUSION

The decision of the Court of Appeals in this case cannot co-exist with *Hudson*. Or, perhaps more realistically, *Hudson* cannot co-exist in Minnesota with what the BMS, the PERB, and the Court of Appeals have done in this case *and will surely do in "fair-share" case after case* hereafter. Absent this Court's intervention, the constitutional mandates of *Hudson* will cease to exist—if they still retain any flicker of life now—in Minnesota. And, on the precedent of Minnesota, those mandates will

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[46] *See, e.g.*, Vlandis v. Kline, 412 U.S. 441, 452 (1973); Bd. of Educ. v. LaFleur, 414 U.S. 632, 643-46 (1974); Dep't of Agriculture v. Murry, 413 U.S. 508, 514 (1973).

likely suffer euthanasia in other States in which the political influence of organizations such as AFSCME means more to administrators and judges than do the First-Amendment freedoms of powerless nonunion employees.

For these reasons, the writ should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

Order of the
Supreme Court of Minnesota
denying petition
for writ of certiorari

19 April 1989

STATE OF MINNESOTA
IN SUPREME COURT
C2-88-1779

In the Matter of:
Carter Thomas Gorham Kuehn,
challenger,

Relator,

vs.

American Federation of State,
County & Municipal Employees,
Council No. 65, Hibbing, Minnesota,

Respondent,

County of Crow Wing, Brainerd,
Minnesota,

Respondent,

State, Public Employment
Relations Board,

Respondent.

ORDER

Based upon all the files, records and proceedings herein,

IT IS HEREBY ORDERED that the petition of Carter Thomas Gorham Kuehn for further review be, and the same is, denied.

Dated: 4-18-89

BY THE COURT:

OFFICE OF
APPELLATE COURTS
APR 19, 1989

FILED

Peter S. Popovich

Chief Justice

APPENDIX B

Opinion of the Court of Appeals of Minnesota

31 January 1989

[130] **In the Matter of Carter Thomas Gorham KUEHN, challenger, Relator,**

v.

AMERICAN FEDERATION OF STATE, COUNTY & MUNICIPAL EMPLOYEES, COUNCIL NO. 65, HIBBING, MINNESOTA.

No. C2-88-1779.

Court of Appeals of Minnesota.

Jan. 31, 1989.

* * * * *

[131] Heard, considered and decided by SCHUMACHER, P.J., and PARKER and SHORT, JJ.

OPINION

Relator Carter Thomas Gorham Kuehn appeals the Public Employment Relations Board's decision regarding the procedures used by respondent American Federation of State, County and Municipal Employees in assessing fair share fees pursuant to Minn.Stat. § 179A.06, subd. 3 (1986). We affirm the Board's decision and hold that Minn.Stat. § 179A.06, subd. 3 is constitutional on its face and as applied.

SHORT, Judge.

FACTS

Relator Carter Thomas Gorham Kuehn began working at the Department of Planning and Zoning Office of

Crow Wing County in Brainerd, Minnesota in September, 1985. Respondent American Federation of State, County and Municipal Employees, Council 65, Local 689A ("Council 65" or "the Union") is the certified representative for a bargaining unit of approximately fifty-four employees of the County of Crow Wing. Kuehn is one of three members of the bargaining unit who is not a member of Council 65.

The auditor's first fair share fee deduction was taken from the paycheck Kuehn received on September 12, 1986. On September 15 Kuehn wrote a letter to both the Union and BMS asking that the Union provide him with a detailed breakdown of the Union's expenditures. In his letter Kuehn also requested that his employer escrow Kuehn's fair share fee. On September 25 Kuehn filed a formal challenge to the fair share fee assessment with BMS. On October 2, BMS ordered the Crow Wing County Auditor to "hold in escrow any deductions of a fair share fee for *Carter Thomas Gorham Kuehn* pending a decision by the Director of the Bureau of Mediation Services."

On October 6 the Union replied to Kuehn's request by providing him with the amount of the regular dues of AFSCME and Council 65 and the fair share fee calculation. The Union also included a copy of the Council 65 financial statement showing the audited expenses from January 1, 1985 through December 31, 1985, as well as other Council 65 information, and the AFSCME International financial statement for the fourth quarter of 1985.

[132] BMS scheduled a hearing on Kuehn's fair share fee challenge for March 3, 1987. The hearing was continued to April 20 and 21, 1987. On December 4, 1987, BMS found the August notice to be insufficient and ordered that Council 65 refund Kuehn any deductions

made prior to October 6, 1986. BMS further held that AFSCME's procedures used with the October 6 notice were proper.

Kuehn appealed the BMS decision to the Public Employment Relations Board ("PERB") pursuant to Minn.Stat. § 179A.04, subd. 1(e) (1986). PERB held a hearing on the matter, and issued a decision upholding the findings made by BMS in their entirety.

ISSUES

I. Does Minn.Stat. § 179A.06, subd. 3 on its face violate a fair share fee payor's rights under the First and Fourteenth Amendments of the United States Constitution?

II. Does Minn.Stat. § 179A.06, subd.3 violate Kuehn's First and Fourteenth Amendment rights as interpreted and applied by the Bureau of Mediation Services and the Public Employment Relations Board?

III. Did the Public Employment Relations Board err by holding that organizations affiliated with Council 65 may assess fair share fees pursuant to Minn. Stat. § 179A.06, subd. 3?

ANALYSIS

The standard of review of PERB's decision is dependent on the particular issue to be reviewed. This court has de novo review of Kuehn's constitutional challenges to Minn.Stat. § 179A.06, subd. 3 because PERB found it did not have jurisdiction over those issues and therefore made no determinations as to them. *Minnesota Racetrack, Inc. v. Goldberg*, 403 N.W.2d 885, 889 (Minn.Ct. App. 1987). An agency's decision is reversed only when

the decision reflects an error of law, the determinations are arbitrary and capricious, or the findings are unsupported by the evidence. *Cable Communications Board v. Nor-West Cable Communications Partnership*, 356 N.W.2d 658, 668 (Minn.1984).

I.

Kuehn challenges the facial validity of Minn.Stat. § 179A.06, subd. 3 on three grounds. First, Kuehn argues that the statute on its face violates a fair share fee payor's association rights under the first and fourteenth amendments because the calculation of the fees includes the Union's costs of benefits available to nonunion members, even if the benefits are unrelated to collective bargaining and contract administration. Second, Kuehn contends that the notice provision in Minn.Stat. § 179A.06, subd. 3 is constitutionally inadequate because it fails to disclose the basis for the fee in advance of charging the fee. And third, Kuehn argues that Minn.Stat. § 179A.06, subd. 3 is facially invalid because the statute places an unreasonable burden on the nonunion member to "specify those portions of the fee challenged and the reasons for the challenge."

Courts will not invalidate a statute on its face simply because it may be applied unconstitutionally, but only if it cannot be applied consistently with the Constitution. *Robinson v. State of New Jersey*, 806 F.2d 442, 446 (3d Cir.1986), *cert. denied*, 481 U.S. 1070, 107 S.Ct. 2463, 95 L.Ed.2d 872 (1987). The United States Supreme Court has stated that a statute may only be declared facially invalid if 1) it is "unconstitutional in every conceivable application," or 2) if it "seeks to prohibit such a broad range of protected conduct that it is unconstitutionally 'overbroad.'" *Members of the City Council of Los Angeles*

v. Taxpayers for Vincent, 466 U.S. 789, 796, 104 S.Ct. 2118, 2124, 80 L.Ed.2d 772 (1984).

A. Association Rights

Kuehn argues that Minn.Stat. § 179A.06, subd. 3 violates a fair share fee payor's first amendment rights because the calculation of the fees includes a union's costs of benefits available to nonunion members even if the benefits are unrelated [133] to collective bargaining and contract administration. To be constitutional, according to Kuehn, the calculation should include only benefits related to collective bargaining and contract administration. Minn.Stat. § 179A.06, subd. 3 (1986) provides:

> The fair share fee shall be equal to the regular membership dues of the exclusive representative, less the cost of benefits financed through the dues and available only to members of the exclusive representative. In no event shall the fair share fee exceed 85 percent of the regular membership dues.

Kuehn admits that our inquiry should be that articulated in *Ellis v. Brotherhood of Railway, Airline & Steamship Clerks*, 466 U.S. 435, 104 S.Ct. 1883, 80 L.Ed.2d 428 (1984). In *Ellis*, the Supreme Court stated that the question in determining the validity of a fair share fee is "whether the challenged expenditures are necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer in labor-management issues." *Id.* at 448, 104 S.Ct. at 1892.

The statutory formula under review is consistent with, but narrower than the formula set forth in *Ellis*. Under Minn.Stat. § 179A.06, subd. 3, fair share fee payors do not get charged for benefits only available to "members

of the exclusive representative." Fair share fee payors are only charged those costs related to collective bargaining and contract administration. Therefore, the calculation provision of Minn.Stat. § 179A.06, subd. 3 can be construed in a constitutional manner and is therefore a valid provision. *See Robinson*, 806 F.2d at 448 (upholding validity of similarly worded New Jersey statute against facial constitutional challenge).

B. Notice Provision

Kuehn also attacks the facial validity of Minn.Stat. § 179A.06, subd. 3 on procedural grounds. Kuehn argues that the notice provision of Minn.Stat. § 179A.06, subd. 3 is constitutionally inadequate because it does not require the exclusive representative to disclose to the fair share fee payor the basis for the fee in advance of charging the fee. We disagree.

Minn.Stat. § 179A.06, subd. 3 (1986) states that "[t]he exclusive representative shall provide advance written notice of the fair share fee to the director, the employer, and to unit employees who will be assessed the fee." Although the statute requires advance notice to be given, it does not detail what information must be contained in the notice. However, Minn.Stat. § 179A.04, subd. 3(f) (1986) authorizes the director of BMS to adopt rules to regulate the forms of petitions, notices and orders. BMS proposed amendments to its fair share fee rules three months after the United States Supreme Court rendered its decision in *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986). In that case, the Court held that a union is required to provide all "potential objectors" to a fair share fee with adequate information concerning the basis for the amount of the fee, and that the information

should be sufficient to enable the potential objectors "to gauge the propriety of the union's fee." *Id.* at 306, 106 S.Ct. at 1076. BMS's amendments became effective in October of 1986, and were followed by the second notice to Kuehn which is under review in this case.

The amendments included Minn.R. 5510.1410, subpt. 1(D) (1987) which details that the advance notice must contain "sufficient information to identify expenditures for collective bargaining and contract administration services." That rule requires a union to identify expenditures for collective bargaining and contract administration services. The rules are consistent with the *Hudson* requirement that at the very least a union should provide "adequate disclosure * * * [of] the major categories of expenses." *Hudson*, 475 U.S. at 307 n. 18, 106 S.Ct. at 1076 n. 18. With information as to expenditures for collective bargaining and contract administration services, a nonunion employee would have sufficient information to make an informed objection to the use of his service fees if the employee desired. *See id.*; *Damiano v. Matish*, 830 F.2d 1363, 1370 (6th Cir.1987); *Tierney v.* [134] *City of Toledo*, 824 F.2d 1497, 1503 (6th Cir.1987). Because the notice provision of Minn.Stat. § 179A.06, subd. 3 is to be read in conjunction with the regulatory amendments which require a union to provide information about collective bargaining and contract administration services, Kuehn received constitutionally adequate notice.

C. Burden on Nonunion Members

Kuehn also argues that the Minnesota fair share fee statute places an unreasonable burden on the nonunion member to "specify those portions of the fee challenged and the reasons for the challenge." He states that it is impossible for a nonunion member to challenge any spe-

cific portions of the amount of the fee when the statute does not require the union to disclose, in advance of a reduction of fees from the paycheck, the expenditures the union includes in its calculation of the fee. For the reasons stated above, this argument is without merit. Minn.R. 5510.1410, subpt. 1(D) requires that the union provide sufficient information to identify expenditures for benefits available only to members of the exclusive representative as well as information to identify expenditures for collective bargaining and contract administrative services. The rule was followed in this case and there was no unreasonable or unconstitutional burden placed on Kuehn.

II.

In addition to arguing that Minn.Stat. § 179A.06, subd. 3 is facially unconstitutional, Kuehn further argues that the statute as interpreted and applied by BMS and PERB is unconstitutional. Kuehn argues that (a) the "residium approach" used by BMS to determine the amount of the fair share fee was not authorized by the statute; (b) that BMS and PERB incorrectly concluded that the October 6, 1986 notice was constitutionally adequate; (c) that BMS and PERB incorrectly found that he received a "prompt review"; and (d) that BMS and PERB misapplied the burden of proof in this case. We disagree and find that the statute is constitutional as applied.

A. Residium Approach

Minn.Stat. § 179A.06, subd. 3 (1986) provides that:

> The fair share fee shall be equal to the regular membership dues of the exclusive representative, less the cost of benefits financed through the dues

> and available only to members of the exclusive representative. In no event shall the fair share fee exceed 85 percent of the regular membership dues.

Under the residium approach, the totality of union expenditures are examined, with particular scrutiny in areas of concern raised by the challenger. Members-only benefit costs are deducted from the regular membership dues as well as the costs of impermissible political and ideological activities. The fair share fee payor is only required to pay the remaining balance or 85 percent of the regular dues, whichever is less. This approach is consistent with the language of the statute which authorizes the union to subtract benefits available only to union members from the regular membership dues to arrive at a fair share fee.

B. The Notice Was Adequate

The October 6, 1986 fair share fee assessment notice is constitutional. Kuehn's argument that the notice did not state which expenditures were included and excluded in calculating the fair share fee is factually incorrect. The notice included Council 65 financial information from January 1, 1985 through December 31, 1985, AFSCME International financial information expenses for the fourth quarter of 1985, and financial information for Council 65. Each of these financial information sheets listed permissible and impermissible expenses. Based on these records, BMS found that the October 6, 1986 notice of fair share fee assessment was an adequate notice. This finding is adequately supported by the evidence and must be affirmed. *See Cable Communications Board v. Nor-West Cable*, 356 N.W.2d at 668 (standard of review for factual findings is whether they are supported by the evidence).

[135] Appellant argues that the notice was inadequate because the independent auditor's verification did not articulate which expenses were related to collective bargaining and which were members-only benefits. The United States Supreme Court has recommended that a fair share fee notice include an independent auditor's verification of a union's expenditures so as to provide nonmembers with adequate information about the basis for the proportionate fee. *See Hudson*, 475 U.S. at 306, 106 S.Ct. at 1076. However, the Court did not require that an independent auditor categorize expenditures of the union as chargeable and nonchargeable. An independent auditor would be unfamiliar with the functioning of a union so that categorizing expenditures would be nearly impossible. Moreover, it is a union's responsibility to present its own categorization of expenditures, not the independent auditor's.

Kuehn also argues that the Union improperly determined its fair share by multiplying the regular dues by 85 percent. Pursuant to Minn.Stat. § 179A.06, subd. 3, a nonmember is only required to pay the costs related to collective bargaining and representative activities or 85 percent of the regular dues, whichever is less. In the present case, after examining and separating the expenditures, all three union levels of percentages of permissible charges were determined to be more than the statutory maximum. Therefore, in accordance with the statute, the Union properly multiplied the regular dues by 85 percent.

C. Kuehn Received a Prompt Review

There was a five month time period between BMS's receipt of Kuehn's challenge in September 25, 1986 and the hearing on March 3, 1987. Appellant argues that he did not receive a "prompt review" and thus, his constitu-

tional rights were violated. The United States Supreme Court in *Hudson* stated that a nonmember has a right to a "reasonably prompt decision by an impartial decision-maker * * * to minimize both the impingement and the burden" on the dissenting employee's first amendment rights. *Hudson*, 475 U.S. at 309, 106 S.Ct. at 1077. The Court did not articulate what it thought would constitute "a reasonably prompt decision." PERB concluded that in light of the voluminous record as well as BMS's desire to complete the first post-*Hudson* fair share fee case, appellant received a reasonably prompt review by an impartial state agency. Under these facts, we agree that appellant received a reasonably prompt hearing and decision.

D. Burden of Proof

Kuehn argues that BMS erred in determining that once the exclusive representative has made a prima facie showing as to the validity of the fee, the burden then shifts to the challenger-appellant. Minn.Stat. § 179A.06, subd. 3 (1986) expressly provides that "[t]he burden of proof relating to the amount of the fair share fee is on the exclusive representative." Minn.R. 5510.1610 (1987) provides that "[t]he exclusive representative shall have the burden of proof to establish the validity of the amount of the fair share fee." The statute and rule make clear that the union has the ultimate burden of proof in establishing the validity of the fair share fee. BMS did not shift the burden of proof to appellant, but merely required appellant to proceed with his contrary evidence once the Union made a prima facie case. *See Peterson v. Minneapolis State Railway Co.*, 226 Minn. 27, 34, 31 N.W.2d 905, 909 (1948). BMS's decision is thus consistent with the statute and the rule.

III.

Kuehn's final argument is that PERB erred by holding that fair share fees could be assessed pursuant to Minn. Stat. § 179A.06, subd. 3 by organizations affiliated with Council 65. Kuehn argues that he should not be required to pay fair share fees to organizations that are affiliated with his exclusive representative (Council 65) but are not actually his exclusive representative.

BMS found that the organizational bodies to which per capita tax payments are paid may provide services to Council 65 in [136] fulfilling its collective bargaining and contract administration responsibilities. This finding is supported by the evidence. Based on this finding, BMS held that payments to other levels of an integrated organization may be included in the base for determining an appropriate fair share fee. PERB agreed, stating that AFSCME was an integrated organization and therefore could appropriately include in the calculation of fair share fees payments of other levels of its organization. Those findings are supported by the evidence.

DECISION

Minn.Stat. § 179A.06, subd. 3 is constitutional on its face and as applied. The findings in this case are supported by the evidence, there is no error of law and the decision of PERB is not arbitrary or capricious.

AFFIRMED.

APPENDIX C

Decision of the Minnesota Public Employment Relations Board

26 July 1988

[SEAL]

STATE OF MINNESOTA

PUBLIC EMPLOYMENT RELATIONS BOARD
HERBERT T. CUSTER, CHAIR

Suite 3, 1380 Energy Lane
St. Paul, Minnesota 55108

(612) 649-5450

IN THE MATTER OF:

CARTER THOMAS GORHAM KUEHN, CHALLENGER
-AND-
AMERICAN FEDERATION OF STATE, COUNTY & MUNICIPAL EMPLOYEES, COUNCIL NO. 65, HIBBING, MINNESOTA
-AND-
COUNTY OF CROW WING, BRAINERD, MINNESOTA

CASE NO. 87-FSF-149

Took no part:
Church, Albert
O'Connor, Micheal

I. PROCEDURAL HISTORY

This is an appeal by Carter Thomas Gorham Kuehn (hereinafter "Challenger") from a fair share fee determination of the Commissioner of the Bureau of Mediation Services (hereinafter "Commissioner").

This matter was initiated by the Challenger filing with the Commissioner a challenge to the amount of a fair share fee assessment levied by the exclusive representa-

tive the American Federation of State, County and Municipal Employees, Council No. 65, Hibbing, Minnesota (hereinafter "Council 65"). The Challenger is employed by the County of Crow Wing, Brainerd, Minnesota (hereinafter "County"). Pursuant to this challenge, hearings were conducted by the Bureau of Mediation Services on March 3, 1987, April 20, 1987, and April 21, 1987.

On December 4, 1987, the Commissioner issued a fair share fee determination substantiating the adequacy of the October 6, 1986, notice of fair share fee assessment and the amount of fair share fee assessed by Council 65, with the exception of those fees escrowed by the County prior to October 6, 1986.

[2] On December 16, 1987, the Challenger filed an appeal of the Commissioner's decision with the Public Employment Relations Board (hereinafter "Board"). The Challenger limited the scope of the appeal to the adequacy of the notice of fair share fee assessment; the propriety of the order of escrow; the amount of fair share fee assessment; whether the Challenger was provided a prompt hearing by an impartial decision-maker; and if the exclusive representative met its burden of proof.

Pursuant to Minn. Stat. 179A.05, subd. 5, (1986) this appeal is before the Board upon the record established by the Commissioner. In addition, the parties were afforded the opportunity of submitting briefs and orally presenting their positions at a hearing conducted by the Board on May 3, 1988.

II. ISSUES

Was the Commissioner correct in determining that the October 6, 1986, notice of fair share fee assessment was adequate?

Was the Commissioner correct in determining that the amount of the fair share fee was proper?

Did the Commissioner provide a reasonably prompt review and decision?

Was the Commissioner correct in finding that Council 65 met its burden of proof?

III. FACTS

AFSCME Council 65, Local 689A is the certified exclusive representative for a bargaining unit of approximately 54 employees of the County of Crow Wing. (TR-106, Vol. #3)

The Challenger is one of three members of the bargaining unit who do not belong to Local 689A. (TR-53, Vol. #3)

The regular membership dues for Local 689A depend upon the hourly wage rate of the employee. (TR-53, Vol. #3)

In 1986, the regular membership dues of an employee of the same wage rate as the Challenger were $17.60 monthly. At this time, the Challenger was assessed $14.96 monthly. (CHallenger Exhibit No. 7)

The Breakdown of the regular membership dues of an employee, of the same wage rate as the Challenger in 1986, was $4.30 to the International, $11.90 to Council 65 and $1.40 to Local 689A. (Union Exhibit No. 15)

[3] The Challenger received notice of fair share fee assessment dated August 26, 1986, which was not in compliance with the newly adopted rules of the Bureau of Mediation Services. (PERB Exhibit No. 1)

The Challenger received a second notice of fair share fee assessment dated October 6, 1986, that was in compliance with the newly adopted rules of the Bureau of Mediation Services. (PERB Exhibit No. 1)

In a letter dated October 2, 1986, the County Auditor was directed to escrow the Challenger's fair share fee assessment. (Challenger Exhibit No. 6)

IV. DISCUSSION

Minn. Stat. 179A.06, subd. 3 (1986) provides authority to an exclusive representative to assess a fair share fee and prescribes responsibilities to the employer and exclusive representative when a fair share fee is levied as follows:

> FAIR SHARE FEE. An exclusive representative may require employees who are not members of the exclusive representative to contribute a fair share fee for services rendered by the exclusive representative. The fair share fee shall be equal to the regular membership dues of the exclusive representative, less the cost of benefits financed through the dues and available only to the members of the exclusive representative. In no event shall the fair share fee exceed 85% of the regular membership dues. The exclusive representative shall provide advance written notice of the amount of the fair share fee to the director, the employer, and to unit employees who will be assessed the fee. The employer shall provide the exclusive representative with a list of all unit employees.

Minn. Stat. 179A.06, subd. 3, also provides for a challenge to a fair share fee assessment by an aggrevied employee or person in relevant part as:

> ... A challenge by an employee or by a person aggrevied by the fee shall be filed in writing with the director, the public employer, and the exclusive representative within 30 days after receipt of the written notice. All challenges shall specify those portions of the fee challenged and the reasons for the challenge. The burden of proof [4] relating to the amount of the fair share fee is on the exclusive representative. The director shall hear and decide all issues in these challenges. The employer shall deduct the fee from the earnings of the employee and transmit the fee to the exclusive representative 30 days after the written notice was provided. If a challenge is filed, the detuctions for a fair share fee shall be held in escrow by the employer pending a decision by the director.

An exclusive representative of public employees is required to negotiate and administer a collective bargaining agreement covering greivances and terms and conditions of employment for all employees coming within the appropriate bargaining unit for which it has been certified. *See* Minn. Stat. 179A.03, subds. 6 and 8 (1986). Since this obligation extends equally to both members and non-members of the exclusive representative, the legislature has permitted the exclusive representative to assess a fair share fee to cover the cost of services rendered those employees who choose not to join its organization. *See* Minn. Stat. 179A.06, subd. 3 (1986).

The Challenger asserts that the Board should review the procedures used by Council 65 to assess a fair share fee upon him and review the procedures and legal criteria used by the Bureau to investigate and determine the legal validity of Council 65"s assessment. The Challenger further argues that the Board must, in its review, deter-

mine whether the assessment and the determination meet the substantive and procedural standards required by the First and Fourteenth Amendments of the United States Constitution. The issues cited in the Challenger's appeal pose the following questions: May "per capita" tax payments be included in the calulation of the fair share fee assessment; Was the notice of fair share adequate and the escrowing of the fees proper; Was the Challenger provided a reasonably prompt review and decision by an impartial decision-maker; And did the exclusive representative meet its burden of proof. The Challenger urges the Board to reverse the Commissioner and order that all of the Challenger's escrowed fair share fees be returned to him.

Council 65 maintains that the notice of the fair share fee assessment dated October 6, 1986, was more than adequate and that the order of escrow is proper because the union is deprived of the use of the fair share fee during the pendency of a challenge, thereby, fully protecting any constitutional claim of the Challenger. Council 65 claims the Bureau provided a prompt review, that "per capita" tax payments may be included in the calulation of the fair share fee and that it did meet its burden of proof. Council 65 asserts the Challenger has not raised any objection to the amount of the fair share fee [5] assessment which attests to the procedurally and substantively valid and supportable fee assessment. Council 65 urges the Board to dismiss with prejudice the Challenger's appeal and substain the Commissioner's findings and orders.

The Board must in the outset respond to the Challenger's request that the Board assure that the procedures established by statute and rule are consitutionally

sound. It is outside the Board's authority to adjudicate constitutional claims. The authority of an administrative agency is limited to and dependent upon the statute under which it operates. *McKee v. County of Ramsey*, 310 Minn. 192, 245 N.W. 2d 460 (1976), *Cable Communications Board v. Nor-West Cable*, 356 N.W. 2d 658, 668 (Minn. 1984). Minn. Stat. 179A.05 (1986) does not provide the Board with authority to consider constitutional issues.

Moreover, it cannot be denied that an administrative agency, as part of the executive branch, lacks authority to adjudicate the constitutionality of the statutory framework it administers. The doctrine of separation of powers establishes that the power to decide constitutionality is vested soley in the courts. *See United States v. Nixon*, 418 U.S. 683, 704-705 (1974) and *Marbury v. Madison*, 1 Cranch. 137, 2 L. Ed. 60 (1803).

The Board in its review of the validity of Council 65's notice and amount of fair share fee assessment, finds it appropriate to examine the following findings of the Commissioner.

> That "per capita" tax payments may be included in the calculation of the fair share fee.
>
> That the August 26, 1986, notice of fair share fee assessment was inadequate and therefore, improper for Council 65 to assess any fee prior to October 6, 1986.
>
> That the October 6, 1986, notice of fair share fee assessment was adequate.
>
> That the escrow provisions and procedures are appropriate.

That the Challenger was provided a reasonably prompt review and decision by an inpartial decision-maker.

That "per capita" tax payments may be included in the calulation of the fair share fee.

The question as to whether "per capita" tax payments to other levels of an integrated organization may be included in the base for determining an appropriate fair share fee was previously determined [6] by the Board and affirmed by Ramsey County District Court.[1]

The record clearly establishes AFSCME is an integrated organization. The structure of AFSCME is composed of three parts; the International; the Council; and the Local. The International charters both Councils and Locals. (TR-24, Vol. #2) Each level of AFSCME provides different services. The Councils are the intermediate level and provide primary services to Locals in the negotiation of contracts, handling of greivances, participating in arbitration and works with the Local to assure that it is operating in compliance with its constitution. (TR-23, Vol. #2) The International provides backup services to Councils and Locals upon request. (TR-16, Vol. #2) Every Council is required to draft its own constitution, and that constitution must be in conformity with the International constitution and submitted to the International for ratification before it can be operative. (TR-26;27, Vol. #2) Appendix C of the International constitution provides a model constitution for Local

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[1] *The Unfair Share Employees Organization of Ramsey County Welfare Department, St. Paul, Minnesota and the American Federation of State, County & Municipal Employees, Council No. 91, St. Paul, Minnesota,* Ramsey County Court File 425616.

unions and this is a binding model on Locals who have not otherwise submitted their constitution for ratification to the International. (TR-39, Vol. #2) The International has authority to impose an administratorship upon a subordinate and has exercised this power when certain provisions of the International constitution were violated (TR-29;30, Vol. #2) The International defines the geographical jurisdiction of a Local and provides that a Local with less than 10 members be deactivated. (TR-31;32, Vol. #2) The International defines the jurisdiction of a Council either geographically or by employee type. (TR-24, Vol. #2)

The Board finds AFSCME to be an integrated organization and therefore may appropriately include in the calculation of the base of the fair share fee assessment the "per capita" tax payments of the other levels of its organization.

That the August 26, 1986, notice of fair share fee assessment was inadequate and therefore, improper for Council 65 to assess any fee prior to October 6, 1986.

The record reveals that the initial notice of fair share fee assessment dated August 26, 1986, (Challenger Exhibit #3) does not [7] fulfill the requirements of Minnesota Rule 5510.1410, Subpart 1.[2] The Board agrees with the Bureau that the notice was inadequate and inappropriate for Council 65 to assess a fair share fee until it had issued a notice which was in conformance with the disclosure requirements of the Bureau's amended rules.

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[2] On the date of this notice the Bureau was in the process of implementing its newly adopted rules which were amended to bring them into conformance with the disclosure requirements of *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 106 SUP. CT. (1986)

That the October 6, 1986, notice of fair share fee assessment was adequate.

An examination of the record shows that the notice of fair share fee assessment dated October 6, 1986, (Challenger Exhibit #7) does comply with Minnesota Rule 5510.1410, Subpart 1.

The Challenger argues that the October 6, 1986, fair share fee norice is inadequate, contending that the notice does not meet the requirements set out by the decisions of the United States Supreme Court and that the Notice does not state what union expenditures were included in calulating the amount of the fair share fee and what union expenditures were excluded from that calulation.

Minnesota Rule 5510.1410, Subpart 1 (D) requires that the exclusive representative provide certain financial information in its notice of fair share fee as follows:

> D. sufficient information to identify expenditures for benefits available to members of the exclusive representative and sufficient information to identify expenditures for collective bargaining and contract administration services that have been provided for bargaining unit employees without regard to membership status;

The Board examined the Notice and found that Council 65 did fully disclose the financial information as the rule requires and that the Challenger acknowledges receipt of this information. (TR-4;5)

The Bureau's rules do not require a C.P.A. verified breakdown of expenditures. The Challenger seems to argue despite the fact that the rules do not require the verification, the Notice should have included a disclosure

by an independent audit commission. As discussed earlier, the Board will not determine whether the Bureau's rules meet the constitutional requirements.

[8] *That the escrow provisions and procedures are appropriate and proper.*

Minn. Stat. 179A.06, subd. 3, provides responsibilities to the public employer when a challenge to a fair share fee assessment occurs as follows:

> . . . If a challenge is filed, the detuctions for a fair share fee shall be held in escrow by the employer pending a decision by the director.

Minnesota Rule 5510.1510, Subpart 5, requires the Challenger to file a copy of the challenge petition with the exclusive representative and the employer and prescribes a penality if the Challenger fails to do so.

> Subp. 5. Service on exclusive representative and employer. A copy of the challenge petition shall be served by the petitioner upon the exclusive representative and the employer, in person or by mail, within the 30-calendar-day challenge period.
>
> Failure to serve a copy of a challenge petition upon the exclusive representative or employer in a timely manner shall be grounds for dismissing the petition.

The Board is in agreement with the Bureau that the statute and rule preclude improper use of the fair share fee assessment during the pendency of a challenge. Of equal importance, is the total absence from the record, of the Challenger's assessment being improperly and inadequately safequarded during the pendency of the challenge.

The Challenger contends that the Challenger's fair share fees were improperly withheld and escrowed. As discussed earlier the Board agrees that the August 6, 1986 Notice was defective, but holds that the October 6, 1986 Notice was adequate. Accordingly, the Board concurs with the Bureau's order that the funds withheld from the Challenger prior to October 6, 1986, be refunded to the Challenger. Since the October 6, 1986 Notice was sufficient, the Board agrees that the withholding and escrow of the Challenger's fair share fee after October 6, 1986, is appropriate.

The Challenger argues that because the *original* Notice was defective, *no* fair share fees can ever be escrowed. The Board is not persuaded by this argument. The exclusive representative, as with any other party, may cure a procedural defect. It would be absurd to hold that a party cannot re-notice and proceed in accordance with the cured notice.

[9] *That the Challenger had a reasonably prompt review.*

The record provides specific dates from the time the Bureau received the Challenger's petition for hearing until the Bureau issued its decision. The following is a chronological listing of the events that took place: (PERB Exhibit No.1)

September 26, 1986 - Challenger's petition for hearing.

March 3, 1987 - First hearing conducted by the Bureau.

April 20, 1987 - Second hearing conducted by the Bureau.

April 21, 1987 - Third hearing conducted by the Bureau.

July 21, 1987 - Conclusion of the Briefing Schedule.

December 4, 1987 - Decision of the Bureau issued.

The Board acknowledges that the amount of time to issue the decision from the date of the challenge appears to be unusually long. However, the record shows that certain circumstances contributed to this delay. These circumstances are the timing of the Challenger's petition when the Bureau was in the midst of implementing substantive changes to its rules, thus requiring the exclusive representative to resubmit the notice of fair share fee assessment to comply with the new rules.[3] In addition, another fair share fee case[4] awaiting hearing was selected by the Bureau, due to its broad nature, as a test case to be heard under its new rules. In light of the fact that the Bureau took up the Challenger's petition two working days after it issued its test case leads the Board to conclude that the Bureau acted as expeditiously as was possible under the afore-mentioned circumstances.

The Board would note that the record contains a voluminious amount of documentation which requires considerable time to examine and evaluate before a decision can be rendered.

[10] *Other Issues:*

The Challenger raised several issues in his brief and oral presentation that were not cited as an issue in the Notice of Appeal. These include an objection to the Bureau's application of the "residuum approach" in its determination of the fair share fee assessment; the Bureau's error in its placement of the burden of proof;

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[3] Council 65's initial notice of fair share fee assessment was in compliance with the Bureau's rules as they existed pre-*Hudson*.

[4] *Judy M. Gernander, et al, and Inter-Faculty Organization and State University Board*, BMS Case No. 85-FSC-320, February 27, 1987.

and the Bureau's failure to properly delineate what is the nature of the exclusive representative's burden of proof.

The Challenger objects to the Bureau's application of the "residuum approach" in its determination of the appropriateness of the amount of the fair share fee assessment. Specifically, the Challenger argues that the Bureau's "residuum approach" is inconsistent with the *Hudson* decision in that the residuum approach focuses on the cost of expenditures for impermissible activities rather than the cost of expenditures for activities that benefit the Challenger.

Under the "residuum approach" the Bureau separates all expenditures for members-only benefits and those impermissible expenditures for ideological, political, or activities unrelated to contract negotiations or administration. All other expenditures are considered the "residuum" and are appropriate expenditures for the exclusive representative to use as a base to calculate the fair share fee assessment. The Bureau's calculation of the cost of expenditures for members-only benefits is to assure that this amount is within the statutory cap as provided in Minn. Stat. 179A.06, subd. 3.

The Board finds that the Bureau's application of the "residuum approach" does not conflict with the statute or rule, and simply implements the statutory requirements. The Challenger, in raising an objection to the "residuum approach" seems to argue that despite the fact that the Bureau's rules do not require the Bureau to focus on the cost of expenditures for activities that benefit the Challenger, the Bureau should have focused on those expenditures. Again, the Board will not examine whether the Bureau's rules meet the constitutional requirements.

The Board finds that the application of this method best accomplishes the difficult task of allocating between collective bargaining services and union membership benefits. The Board fully supports the Bureau's application of the "residuum approach".

Finally, the Challenger raises several burden of proof issues. In his Notice of Appeal the Challenger argues that Council 65 did not meet its burden of proof by providing evidence to substantiate the amount of the fair share fee assessment. However, in his brief and oral argument, the Challenger does not discuss this issue, but instead [11] challenges the following standard set forth by the Bureau:

> Under PELRA and applicable Bureau rules, nonmembers of an exclusive representative may challenge the fair share fee assessment. Upon such challenge, the exclusive representative has the burden of proof to demonstrate that the fee is valid in accordance with Minn. Stat. 179A.06, subd. 3. Once the exclusive representative has made a prima facie showing as to the validity of the fee, the burden shifts to the Challenger. The ultimate burden of persuasion in rebutting the Challenger's claims, however, remains with the exclusive representative.

The Challenger contends that it was an error for the burden to shift after the exclusive representative met its prima facie case and cites case law which he claims establishes that the exclusive representative has the burden of proof throughout a fair share fee hearing.

The statute and rule which pertain to the issue of burden of proof are as follows:

> Minn. Stat. 179A.06, subd. 3, provides in relevant part:

> . . . The burden of proof relating to the amount of the fair share fee is on the exclusive representative.
>
> Minnesota Rule 5510.1610 provides in relevant part:
>
> . . . The exclusive representative shall have the burden of proof to establish the validity of the amount of the fair share fee.

The Board finds that the Bureau's interpretation merely implements that statutory and regulatory scheme. As the Bureau makes clear, the ultimate burden of proof remains with the exclusive representative. The Minnesota Supreme Court has stated that the effect of establishing prima facie case is not to shift or change the burden of proof, but merely to shift the task of proceeding with evidence. *Peterson v. Minneapolis St. Ry. Co.*, 226 Minn. 27, 31 N.W. 2d 905, 909 (1948). Thus, the Board concludes that the Bureau's holding is consistent with the statutory and regulatory scheme.

In its examination of the Challenger's argument that the Bureau erred in its delineation of the nature of the exclusive representative's burden of proof because it is contradictory to *Ellis v. Brotherhood of Railway, Airline and Steamship Clerks, Freighthandlers, Express and Station Employees*, 466 U.S. 435 (1984) the Board finds it cannot concur with the Challenger.

[12] Specifically, the Challenger contends that *Ellis* requires that the "test must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employee in dealing with the employer on labor-management issues." rather than the Bureau's application of the statutory test of Minn. Stat. 179A.06,

subd. 3 which provides that "The fair share fee shall be equal to the regular membership dues of the exclusive representative, less the cost of benefits financed through the dues and available only to members of the exclusive representative. In no event shall the fair share fee exceed 85 percent of the regular membership dues."

The Board finds that the Challenger's distinctions between the *Ellis* test and the Bureau's statutory test to be without merit.

Lastly, although the Challenger did not discuss the issue in his written brief or oral argument, the Challenger raised the issue that Council 65 did not meet its burden of proof by providing evidence to substantiate the amount of the fair share fee assessment in his Notice of Appeal. The record demonstrates that Council 65 provided ample documentation and testimony in support of the validity of the amount of the fair share fee assessment. The Board is in agreement with the Bureau that Council 65 met its burden of proof.

In conclusion, the Board in its review of each of the Challenger's issues has determined that the record does not support the claims of the Challenger and thus, warrant a reversal of the Commissioner's ruling.

V. DECISION

The Board after full consideration of the record, finds that the Commissioner was correct in determining that Council 65's October 6, 1986, notice of fair share fee assessment was adequate and the escrow provisions appropriate, and that the amount of the fair share fee was proper, that Council 65 met its burden of proof, and

that the Challenger was provided a reasonably prompt review and decision by an impartial decision-maker.

Accordingly, the decision of the Commissioner is affirmed.

/s/
Herbert T. Custer

/s/
David J. Dombrowski

/s/
David Y. Morris

Dated at St. Paul, Minnesota

July 26, 1988

APPENDIX D

Determination of the Minnesota Bureau of Mediation Services

4 December 1987

IN THE MATTER OF A PETITION FOR INVESTIGATION AND DETERMINATION OF A FAIR SHARE FEE ASSESSMENT CHALLENGE:

DECEMBER 4, 1987

Carter Thomas Gorham Kuehn, Challenger

- and -

American Federation of State, County and Municipal Employees Council No. 65, Hibbing, Minnesota

- and -

County of Crow Wing, Brainerd, Minnesota

BMS CASE NO. 87-FSC-149

DETERMINATION OF A FAIR SHARE FEE CHALLENGE

Introduction

On March 3, 1987, a hearing was conducted by the State of Minnesota, Bureau of Mediation Services (Bureau), at the Crow Wing County Service Center, Brainerd, Minnesota. The hearing was held pursuant to a challenge filed by Mr. Carter Thomas Gorham Kuehn (Challenger) to the fair share fee assessment levied by the American Federation of State, County and Municipal Employees Council No. 65, Hibbing, Minnesota (Council 65). The employer of the Challenger is the County of Crow Wing, Brainerd, Minnesota (County).

At the hearing Mr. Darel Swenson, Attorney at Law, represented the Challenger; Mr. Gregg Corwin and Mr. John Sullivan, Attorneys at Law, represented Council 65; and Mr. Thomas Fitzpatrick, Attorney at Law, represented the County.

At the hearing Mr. Swenson objected to the testimony of Mr. Gary Johnson, Council 65 Staff Representative, based on lack of foundation that Mr. Johnson had first-hand knowledge of the contents of Union Exhibit No. 1.[1] Mr. Swenson's objection was denied. Following Mr. Johnson's testimony, Mr. Corwin requested a continuation of the hearing. Mr. Swenson had no objection and a continuation was granted by the Hearing Officer.

[2] On March 17, 1987, the parties were notified by the Bureau to provide certain information prior to the reconvened hearing. The Challenger was ordered to identify, in writing, the specific items of the fair share fee being challenged. Council 65 was ordered to provide the documents which were used to prepare the financial statements identified as Union Exhibit No. 1. Both the Challenger and Council 65 provided the data requested to each other and the Bureau prior to March 21, 1987. The hearing was reconvened in the offices of the Bureau on April 20 and continued on April 21, 1987.

The briefing schedule established a final submission date of July 21, 1987. Briefs from the Challenger and Council 65 were received in a timely manner.

Issues

A review of the record in this case reveals the following issues to be determined by the Bureau:

1. Did Council 65 provide the Challenger with adequate and proper notice of the fair share fee assessment?

2. May per capita tax payments to AFSCME International and other affiliate bodies be included in the base for calculating the amount of the fair share fee assessment?

3. Was Challenger provided with a reasonably prompt review and decision by an impartial decision-maker?

4. Was the Challenger's fair share fee assessment adequately safeguarded from use for impermissible purposes?

5. Was the amount of the fair share fee assessment proper?

Burden of Proof

Under PELRA and applicable Bureau rules, non-members of an exclusive representative may challenge the fair share fee assessment. Upon such challenge, the exclusive representative has the burden of proof to demonstrate that the fee is valid in accordance with Minn. Stat. § 179A.06, subd. 3. Once the exclusive representative has made a prima facie showing as to the validity of the fee, the burden shifts to the challenger. The ultimate burden of persuasion in rebutting the challenger's claims, however, remains with the exclusive representative.

[3] ***Basis of Review***

The Bureau adopted the "Residuum" approach expressed by the Public Employment Relations Board of the State of Hawaii in 1976 as the basis of review and determination of fair share fee challenges.[2] The Residuum encompasses all collective bargaining and representation activities of an exclusive representative including preliminary planning, preparation, training, budgeting and organizational efforts and the "tooling up" process related to negotiating and administering a labor contract after its consummation. Excluded from the Residuum are members-only benefits and those impermissible expenditures for ideological, political, or activities unrelated to

contract negotiations or administration. The continued appropriateness of the Residuum approach following the most recent U. S. Supreme Court review of fair share fee matters in *Hudson*[3] was affirmed by the Bureau in *Gernander*.[4]

Discussion of Issues

1. A review of the events surrounding the notice of fair share fee assessment reveals the following:

a. On August 28, 1986, the Challenger received a notice of fair share fee assessment.

b. On September 25, 1986, the Challenger properly filed a Challenge of fair share fee assessment with the Bureau.

c. On October 2, 1986, the Bureau directed Mr. Conrad Bye, County Auditor, to escrow the Challenger's fair share fee assessment.

d. On October 6, 1986, Council 65 mailed an explanation of the fair share fee, accompanied by financial documentation setting forth the expenditures of each organizational entity of AFSCME by expense category, including that portion of the total expenditures which were considered non-chargeable for the purpose of the fair share fee assessment.

Challenger argues that the notice of assessment dated August 26, 1986, was inadequate because it failed to provide an explanation for the basis of the fee. Additionally, it is argued that the escrow of the fee was improper because the original notice was faulty.

[4] The record is uncontroverted that the August 26, 1986, notice of assessment was inadequate under Minne-

sota Rules 5510.1510. The October 6, 1986, notice, however, does comport with the statutory and rule requirements and, thus, constitutes adequate notice. Accordingly, any fees collected prior to October 6, 1986, will be ordered refunded.

2. The Bureau has previously determined that per capita tax payments to other levels of an integrated organization may be included in the base for determining an appropriate fair share fee, and has been upheld in this regard upon review by the Second District Court.[5]

The record in this case confirms that AFSCME is an integrated organization. The organizational bodies to which per capita taxes are paid provide services to the Council in fulfilling its collective bargaining and contract administration responsibilities. Challenger's assertion that such per capita tax payments may not be included in the base for calculation of the fair share fee is rejected, as are blanket objections to all expenditures of the International.

3. On March 4, 1986, in *Hudson* the United States Supreme Court held that fee payers should be provided a reasonably prompt opportunity to challenge the amount of the fee before an impartial decision maker. In response to the *Hudson* decision, the Bureau determined that:

1. Agency rules affecting fair share fee assessments required review and amendment; and

2. Because of its broad nature, *Gernander* would be the first agency decision following *Hudson*.

Following a period of public review and comment, in August, 1986, the Bureau adopted rule changes pursuant

to *Hudson*. On February 27, 1987, *Gernander* was issued. Two working days later, on March 3, 1987, a hearing on Challenger's petition was commenced. This hearing was continued to April 20-21, 1987, at the mutual agreement of the parties. Briefs were received by the Bureau in accordance with a July 21, 1987, schedule. There is no adequate basis to suggest that Challenger has been denied a reasonably prompt review and decision in this matter.

[5] 4. PELRA requires escrow of fair share fee assessments by the employer upon the filing of a challenge. Bureau Rules complement this requirement by defining the method and manner of such escrow. The escrow is ordered without judgment of the merits of the challenge. Thus, the provisions of PELRA and Minnesota Rules preclude improper use of the fair share fee assessment during the pendency of any challenge. This procedure is reasonable and consistent with *Hudson*. There is no showing that Challenger's assessments were not properly and adequately safeguarded during the pendency of this challenge.

5. The record establishes that the following activities and expenditures of AFSCME are members-only benefits or impermissible expenditures:

International Category	*Amount of Expenditures*
Field Services	$ 16,568.00
Education and Training	1,201.00
Women's Rights/Community Action	29,705.00
Legislation	12,627.00
Political Action/PEOPLE	819,206.00
Public Affairs	53,971.00
President's Office	148,471.00
Conventions	48,999.00
Inter-Union Affiliations	444,430.00

International Affairs	77,363.00
Legal Services	56,009.00
Personnel	5,039.00
Secretary-Treasurer's Office	19,310.00
Financial & General Operating	84,288.00

Council 65

Newspaper Expense	$ 1,138.00
Legislative Expense	3,326.00
Strike Contributions	1,104.00
PEOPLE Fund	5,300.00
Flowers	214.08
Retirement Party for Director	523.49
Scholarship	1,000.00

Chapter 689A

Newspaper Ad	$ 82.60

[6] A review of total expenditures at each level of AFSCME results in the following finding relative to the percent of members-only and impermissible expenditures:

	Total Expenditures	Total Amount of Impermissible Expenditures	Total Percent of Impermissible Expenditures
International[6]	13,083,503.00	1,817,187.00	13.89%
Council	808,838.00	12,605.57	1.56%
Chapter 689A	9,528.61	82.60	0.87%

All other expenditures of AFSCME are included in the "Residuum". Because the percent of impermissible expenditures does not exceed 15 percent of the regular membership dues at any level of AFSCME, a fair share fee assessment for the Challenger which equals 85 percent of the full-time regular membership dues is proper.

Findings

1. The August 26, 1986, notice of fair share fee assessment is inadequate; therefore, it was improper for Council 65 to assess any fee prior to October 6, 1986.

2. The October 6, 1986, notice of fair share fee assessment is an adequate notice.

3. "Per capita" tax payments may be included in the calculation of the fair share fee.

4. Challenger had a reasonably prompt review and decision by an impartial agency.

5. The escrow provisions and procedures are appropriate and proper.

6. A fair share fee in the amount of $14.96 per month for the Challenger is proper.

[7] ***Orders***

1. Any fees escrowed by the County for assessments made prior to October 6, 1986, shall be transmitted to the Challenger by the County as soon as practicable. Any fees collected by Council 65 prior to October 6, 1986, shall be refunded to the Challenger in full as soon as practicable.

2. Any remaining escrow of fair share fee assessments shall be transmitted to Council 65 by the County 15 days after the date of this Order, or as soon thereafter as is practicable.

3. The County shall post this Order at the work location of the employees involved.

STATE OF MINNESOTA
Bureau of Mediation Services

/s/
PAUL W. GOLDBERG,
Commissioner

PWG:jj

cc: Gregg Corwin
Darel Swenson
Carter Thomas Gorham Kuehn
John Sullivan
Thomas Fitzpatrick
Conrad Bye (2)
(Includes Posting)

[8] ***FOOTNOTES***

1. Union Exhibit No. 1 is composed of financial statements for Chapter 689A, Council 65, AFSCME International, and the Minnesota AFL-CIO.

2. *The Unfair Share Employees Organization of the Ramsey County Welfare Department, Joan Riebel, St. Paul, Minnesota and the American Federation of State, County and Municipal Employees, Council No. 91, Local No. 151, Tom Hennessy, Director, St. Paul, Minnesota,* Ramsey County Court File No. 425616, May 25, 1979.

   Public Employment Relations Board of the State of Hawaii, Decision No. 72 (1976).

3. *Chicago Teachers Union, Local No. 1 v. Hudson,* _____ U.S. _____, 106, S. Ct. 1066 (1986).

4. *Judy M. Gernander, et al, and Inter-Faculty Organization and State University Board,* BMS Case No. 85-FSC-320, February 27, 1987.

5. See *Jahnke, et al and AFSCME Council 91, Local No. 8,* BMS Case Nos. 77-FSC-166-A and 77-FSC-212-A (December 21, 1976); and *Unfair Share Employees,* supra., a case in which counsel for the Challenger was also involved. The Bureau is not aware of any holding by a body of competent jurisdiction which would alter the basis or outcome of these determinations.

6. It is noted that the AFSCME International Constitution provides for reduced per capita payments for individuals whose dues are based upon a formula such as the 85 percent restriction contained in PELRA. Thus, the local is only required to remit 85 percent of the

normal International per capita tax for fair share units. Since impermissible expenses of the International are less than 15 percent of total expenses, it would appear that none of the International per capita tax remitted for fair share units is used for impermissible activities. It is not necessary for us to reach this conclusion to find the amount of the fair share fee assessment appropriate, however. (*AFSCME International Constitution*, Article IX, Sec. 11, p. 75.)

APPENDIX E

Section 179A.06, Subdivision 3 of the Minnesota Public Employment Labor Relations Act

Minnesota Public Employment Labor Relations Act

Sec. 179A.06. Rights and obligations of employees.

* * *

3. An exclusive representative may require employees who are not members of the exclusive representative to contribute a fair share fee for services rendered by the exclusive representative. The fair share fee shall be equal to the regular membership dues of the exclusive representative, less the cost of benefits financed through the dues and available only to members of the exclusive representative. In no event shall the fair share fee exceed 85 percent of the regular membership dues. The exclusive representative shall provide advance written notice of the amount of the fair share fee to the director, the employer, and to unit employees who will be assessed the fee. The employer shall provide the exclusive representative with a list of all unit employees.

A challenge by an employee or by a person aggrieved by the fee shall be filed in writing with the director, the public employer, and the exclusive representative within 30 days after receipt of the written notice. All challenges shall specify those portions of the fee challenged and the reasons for the challenge. The burden of proof relating to the amount of the fair share fee is on the exclusive representative. The director shall hear and decide all issues in these challenges.

The employer shall deduct the fee from the earnings of the employee and transmit the fee to the exclusive representative 30 days after the written notice was provided. If a challenge is filed, the deductions for a fair share fee shall be held in escrow by the employer pending a decision by the director.

* * *

APPENDIX F

Council 65, AFSCME
Fair-Share Notice
and related documents

CERTIFIED MAIL
Return Receipt Requested

August 26, 1986

TO: County Auditor
Crow Wing County Courthouse
Brainerd, Minnesota 56401

and: Director
Bureau of Mediation Services
205 Auroa Ave. 612-296-2525
St. Paul 55103

FROM: Minnesota Council 65, AFSCME, AFL-CIO
1716 East 5th Avenue
Hibbing, Minnesota 55746
Phone: 218-263-8878

In accordance with the provisions of M.S. 179.65, Subd. 2, it is requested that a fair share fee in the amount of $14.96 monthly be deducted from the earnings of the following employee(s) who are not members of the Union:

Carter Kuehn

We certify that this amount is equal to the regular membership dues, less the cost of benefits financed through the dues and available only to members, but in no event does such fee exceed 85% of the regular membership dues. We further certify that affected employees have been served notice of the amount of this fee by first class U.S. Mail.

These deductions are to commence with the first payroll period following receipt of this letter and are to be held by you until 30 days following this notice. At such

time, they are to be transmitted to the Union, unless a challenge has been filed by an affected employee.

Sincerely,

/s/

Fred Argir
Executive Director

FA/els

To: The American Federation of State, County and Municipal Employees

I would like to be provided a breakdown of the fiar share union dues ;I I'm compelled to pay. Please deliniate what the dues I would pay would go for in as detailed a manner as possible. I'm opposed to paying any part of the fair share dues that are not directly related to collective bargaining, contract administration and grievance adjustment.

Thank You

/s/ 9/15/86

Carter Kuehn

P.S.- Please submit your response to me in writing.

American Federation of STATE, COUNTY and
MUNICIPAL Employees AFL-CIO

[SEAL]

MINNESOTA
COUNCIL NO. 65

1716 EAST 5th AVENUE
HIBBING, MINNESOTA 55746
PHONE (218)263-8878

October 6, 1986

Mr. Carter Kuehn
505 Rosewood Street
Brainerd, Minnesota 56401

Dear Mr. Kuehn:

In answer to your challenge of the fair share fee assessment to the Bureau of Mediation Services, I am enclosing Financial Reports of Local 689A, AFSCME Council 65, AFSCME International and Minnesota AFL-CIO.

Sincerely,
/s/
Fred Argir
Executive Director

FA/els
Enclosures

cc: Paul Goldberg, Director
Bureau of Mediation Services

American Federation of STATE, COUNTY and
MUNICIPAL Employees AFL-CIO

[SEAL]

MINNESOTA
COUNCIL NO. 65

1716 EAST 5th AVENUE
HIBBING, MINNESOTA 55746
PHONE (218)263-8878

October 6, 1986

To: Mr. Carter Kuehn
505 Rosewood Street
Brainerd, Minnesota 56401

From: AFSCME Council 65
1716 E. 5th Avenue
Hibbing, Minnesota 55746 (218)263-8878

Subj: Notice of Fair Share Fee

We have examined the financial records of Local 689A, AFSCME Council 65, AFSCME International and the Minnesota AFL-CIO. Attached are financial reports from all the levels of the Union.

The regular dues of Local 689A are $17.60 monthly.

Therefore, a fair share fee assessment in the amount of $14.96 monthly (85% of the regular dues of your local) will be assessed.

This assessment is authorized by Minnesota Statutes 179A.06, Subd. 3, which provides that the amount of this fee shall be "equal to the regular membership dues of the exclusive representative, less the cost of benefits financed through the dues and available to members of the exclusive representative, but in no event shall the fee exceed 85% of the regular membership dues".

An employee may challenge this assessment by filing a challenge with the Bureau of Mediation Services within 30 calendar days after receipt of this notice. The challenge must specify those portions of the assessment being challenged and the reasons therefor, and copies of the challenge must be sent to your employer and this organization. The Public Employment Relations Act requires a fee for filing challenges. Forms for challenges and a copy of the rules governing them are available from the Bureau of Mediation Services without charge by submitting a request to: 205 Aurora Avenue, St. Paul, Minnesota 55103.

While the Union has found it necessary to implement fair share to permit its continued efforts on your behalf, we remain far more interested in seeing you become an active participating member of the Union. We therefore urge you to return the enclosed membership application card so that you can become a part of the decision-making processes of the Union as well.

Sincerely,

/s/

Fred Argir
Executive Director

FA/els,
Enclosures
cc: Local Union President
Local Union Treasurer

AFSCME COUNCIL 65 FINA

1/1/85 - 12/31/85 Au

Expenses	Union Administration C-1 Expenses	Union Governance C-2 Expenses
Salaries	392,645	
FICA	28,161	
Benefits	143,896	
Auto Expense	64,535	
Rent	3,744	
Office Supplies	5,854	
Telephone Expense	15,634	
Postage	5,021	
Unemployment Comp. Tax	2,826	
Xerox Expense	5,886	
Computer Expense	15,827	
Convention & Workshops		11,068
Ex. Board & Committees		15,811
Misc. Expense	20,633	
Newspaper Expense	14,977	
Legal Expense	29,507	
Legislative Expense		
Arbitration Expense		
Strike Contributions		
PEOPLE Fund		
	749,146	26,879

* PEOPLE Fund contribution to be sent retroactive to 198

NCIAL INFORMATION

lited Expenses

Legislative C-3 Expenses	Negotiations & contract Administration C-4 Expenses	Political Ideological Unrelated to Bargaining NC-1 Expenses	Members Only Benefits NC-2
5,811		3,411	
	17,880		
		1,104	
		5,300*	
5,118	17,880	9,815	00
99,023 (99%)			9,815 (1%)

ATTACHMENT (B)

AFSCME INTERNATIONAL FINANCIAL INFORMATION
EXPENSES FOR THE FOURTH QUARTER OF 1985

Expenses	Total 4th Quarter Audited Expenses	Total Expenses Chargeable to Fair Share Payer
Field Services	$5,247,796	$5,231,228
Education & Training	201,361	200,160
Women's Rights/Comm.Action	176,656	146,951
Research & Collective Barg.	323,605	323,605
Legislation	156,406	143,779
Political Action/People	783,136	(36,070)
Public Policy	162,422	162,422
Public Affairs	988,292	934,321
President's Office	599,654	451,183
Conventions	408,322	359,323
Inter-Union Affiliations	1,184,856	740,426
International Affairs	77,363	-0-
Legal Services	466,743	410,734
Executive Board	297,139	297,139
Personnel	41,988	36,949
Judicial Panel	99,818	99,818
Secretary-Treasurer's Office	158,830	139,520
Financial & Gen'l Operating	1,709,116	1,624,828
Totals	13,083,502	11,266,316
Total Chargeable International Expenses (86.111%)		11,266,316
Total International Expenses		13,083,502

Source: Audited 4th Quarter of 1985 Financial Statement of AFSCME International

AFSCME LOCAL 689A FINANCIAL INFORMATION

Union Administration C-1 Expenses	9,336.21		
Union Governance C-2 Expenses	109.80		
Legislative C-3 Expenses	--		
Negotiation & Contract Administration C-4 Expenses	--		
Sub-Total			9,446.01
Political/Ideological Unrelated to Bargaining - NC-1 Expenses	82.60	(newspaper ad)	
Members Only NC-2 Expenses	--		
Sub-Total		(.098%)	82.60
GRAND TOTAL			9,528.61

ATTACHME
MINNESOTA

COMBINED STATEMENT OF REVENUES, EXPEND
YEAR ENDED JU

	General Fund
REVENUES	
Per Capita taxes	$676,022
Roe retirement receipts	41,300
JTPA Grant Funds	45,473
Interest income	25,012
Conference & Convention collections	9,875
Delegate fees	8,140
Frontlash reimbursements	3,800
Rental Income	3,800
Affiliation fees	2,275
Sale of HHH plates	
Contributions	
Other	762
TOTAL REVENUES	816,459
EXPENDITURES	
Personnel costs	344,803
Pension contributions	3,036
Conference and Conventions	68,502
Contributions to Volunteer Committees of Legislative Candidates	
Rental and electricity	45,372
Roe retirement expenses	33,318
Expenses & per diem allowances	31,488
Office supplies & postage	20,519
Telephone	16,040

NT (D)
AFL-CIO

ITURES AND CHANGES IN FUND BALANCE
NE 30, 1985

Retirement Fund	Education Fund	Political Fund	Total
$73,764	$	$45,702	$795,488
	25,000		66,300
			45,473
	2,805		27,817
			9,875
			8,140
			3,800
			3,800
			2,275
	2,027		2,027
		1,000	1,000
		12	774
73,764	29,832	46,714	966,769
			344,803
72,385			75,421
			68,502
		63,010	63,010
			45,372
			33,318
			31,488
			20,519
			16,040

EXPENDITURES (Continued)	General Fund
Dues, subscriptions & fees	15,341
Professional services	14,420
DFL and Caucuses	
Public relations	10,822
Insurance	10,395
Automobile expenses	9,407
Advertising	7,709
Frontlash expenses	5,462
Furniture and equipment purchases	4,660
Office and equipment maintenance	4,588
Printing	4,079
JTPA expenses (non-personnel)	3,999
Contributions	3,595
Scholarships	
Interest expense	2,923
Fair building expenses	2,598
Miscellaneous expenses	4,083
TOTAL EXPENDITURES	667,159
EXCESS REVENUE (EXPENDITURES)	149,300
FUND BALANCE, JULY 1, 1984	357,522
ADJUSTMENT - Student loans written off	(3,700)
FUND BALANCE, JUNE 30, 1985	$503,122

Percent Charge

Source: Audited 1985 Financial S

Retirement Fund	Education Fund	Political Fund	Total
			15,341
			14,420
		12,885	12,885
			10,822
			10,395
			9,407
			7,709
			5,462
			4,660
			4,588
			4,079
			3,999
			3,595
	3,250		3,250
			2,923
			2,598
			4,083
72,385	3,250	75,895	816,689
1,379	26,582	(29,181)	148,080
4,768	38,322	49,787	450,399
			(3,700)
$ 6,147	$64,904	$20,606	$594,779

ble: 89.4

tatement of the Minnesota AFL-CIO

Supreme Court, U.S.
FILED
AUG 17 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-70

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CARTER T. G. KUEHN,
Petitioner,

v.

COUNCIL NO. 65, AMERICAN FEDERATION OF STATE, COUNTY & MUNICIPAL EMPLOYEES, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals of Minnesota

---

BRIEF IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-70

CARTER T. G. KUEHN,

Petitioner,

v.

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On Petition for a Writ of Certiorari to the Court of Appeals of Minnesota

---

BRIEF IN OPPOSITION

The opinions below, the basis for this Court's jurisdiction, and the constitutional and statutory provisions involved are correctly described in the petition for *certiorari*. Pet. 2-3.

STATEMENT OF THE CASE

a. The Minnesota Statute And Implementing Rules At Issue.

The Minnesota Public Employment Labor Relations Act permits unions representing public employees in that State to negotiate collective bargaining agreements requiring the payment by the employees the union represents who do not choose to become union members of a

"fair share fee for services rendered by the exclusive representative." Minn. Stat. § 179A.06; Pet. App. 43a. The fair share fee cannot exceed 85% of normal union dues. Subject to that 85% maximum, the fee is set in an amount equal to normal union dues less the percentage of union expenditures going for non-representational purposes. *Id. See also* Pet. App. 8a.

The statute requires that the union provide advance notice of the amount of the fee to affected employees and employers and to the Director of the Minnesota Bureau of Mediation Services. Pet. App. 43a. Minnesota Rule 5510.1410, subpart 1(D), adopted by the Bureau of Mediation Services following this Court's decision in *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986), specifies that the union's fair share fee notice must contain:

> sufficient information to identify expenditures for benefits available to members of the exclusive representative and sufficient information to identify expenditures for collective bargaining and contract administration services that have been provided for bargaining unit employees without regard to membership status; . . . [Pet. App. 23a.]

Once an employee has received notice of the basis for the fair share fee, the statute allows thirty days for the filing of a challenge to the fee, to be heard and decided by the Bureau of Mediation Services. Pet. App. 43a. When a challenge has been made to the calculation of a fair share fee, the statute requires that the employer hold the disputed fee in escrow until the challenge is resolved. *Id.*

b. The Administrative Proceedings In This Case.

On August 26, 1986, American Federation of State, County and Municipal Employees Council 65, the exclusive collective bargaining representative of the employees in the Crow Wing County Department of Planning and Zoning Office bargaining unit, sent a fair share fee notice to the fee payers employed in that bargaining

unit. On September 25, 1986—two weeks after fee deductions began—the petitioner filed charges with the Bureau of Mediation Services challenging, among other things, the adequacy of Council 65's notice and the amount of the fee. Pet. App. 3a & 35a. In response to those charges, on October 2, 1986, the Bureau directed the petitioner's employer to hold his fair share fee payments in escrow and not turn any of the moneys over to the Union. Pet. App. 35a. Then, on October 6, 1986, Council 65 sent the petitioner a second notice giving a fuller explanation for the basis of the fee. *Id.*

The Bureau of Mediation Services held three days of hearings on the petitioner's charges. Pet. App. 32a-33a. Following the first day of hearings, the Bureau ordered Council 65 to submit additional evidence to support the financial statements that had been introduced into evidence by the Council. Pet. App. 33a. Based on the evidence gathered at the hearings, the Bureau of Mediation Services issued a decision on December 4, 1987, sustaining the petitioner's challenge in part and denying it in part.

Applying its post-*Hudson* regulation retroactively, the Bureau found that *Council 65's August notice* was inadequate, and ordered that all fees held in escrow for the period prior to the issuance of the October notice be returned to the petitioner. Pet. App. 35a-36a. The Bureau found that *Council 65's October notice* does meet the requirements of its post-*Hudson* rule, and allowed the escrowed fees collected after the issuance of that notice to be turned over to the Council. *Id.*, at 36a. Rejecting the petitioner's argument that the fee was excessive because it included a portion of Council 65's per capita payments to the National Union and the Local Union with which Council 65 is affiliated, the Bureau found, "The organizational bodies to which per capita taxes are paid provide services to the Council in fulfilling its collective bargaining and contract administration responsibilities." *Id.*, at 36a.

The Minnesota Public Employment Relations Board considered the petitioner's appeal from the determination of the Bureau of Mediation Services, and based on the record established during the Bureau's hearings sustained the Bureau's findings. Pet. App. 30a. With respect to the adequacy of Council 65's October notice under the Bureau's post-*Hudson* regulation, the Board found that "Council 65 did fully disclose the financial information as the rule requires, ..." Pet. App. 23a. With respect to the Bureau's determination that a portion of Council 65's per capita payments to the International Union and the Local could be included in the fee, the Board concluded:

> The record demonstrates that Council 65 provided ample documentation and testimony in support of the validity of the amount of the fair share fee assessment. The Board is in agreement with Bureau that Council 65 met its burden of proof. [Pet. App. 30a.]

c. The Judicial Proceedings In This Case.

The petitioner appealed the decision of the Public Employment Relations Board to the Minnesota Court of Appeals, raising both constitutional and factual issues. Pet. App. 4a. The court of appeals considered the petitioner's constitutional challenges *de novo*. *Id.* With respect to the petitioner's challenge to the agency factual findings, the Minnesota court applied the normal Minnesota administrative law standard of review. *Id.*

The Minnesota court rejected the petitioner's constitutional challenge to the standard applied by the Bureau in determining the adequacy of Council 65's October notice, reasoning as follows:

> Minn. R. 5510.1410, subpt. 1(D) (1987) . . . details that the advance notice must contain "sufficient information to identify expenditures for collective bargaining and contract administration services." That

> rule requires a union to identify expenditures for collective bargaining and contract administration services. The rules are consistent with the *Hudson* requirement that at the very least a union should provide "adequate disclosure * * * [of] the major categories of expenses." *Hudson*, 475 U.S. at 307 n. 18. With information as to expenditures for collective bargaining and contract administration services, a nonunion employee would have sufficient information to make an informed objection to the use of his service fees if the employee desired. [Pet. App. 8a.]

The Minnesota court then went on to determine that the Bureau's finding that Council 65's notice met the applicable constitutional and statutory requirements was "adequately supported by the evidence":

> The notice included Council 65 financial information from January 1, 1985, through December 31, 1985, AFSCME International financial information expenses for the fourth quarter of 1985, and financial information for Council 65. Each of these financial information sheets listed permissible and impermissible expenses. [Pet. App. 10a.]

The Minnesota court also rejected the petitioner's argument that "he should not be required to pay fair share fees to organizations that are affiliated with his exclusive representative (Council 65) but are not actually his exclusive representative." Pet. App. 13a. That court sustained the Bureau's finding on the following grounds:

> BMS found that the organization bodies to which per capita tax payments are paid may provide services to Council 65 in fulfilling its collective bargaining and contract administration responsibilities. This finding is supported by the evidence. Based on this finding, BMS held that payments to other levels of an integrated organization may be included in the base for determining an appropriate fair share fee. PERB agreed, stating that AFSCME was an

> integrated organization and therefore could appropriately included in the calculation of fair share fees payments of other levels of its organization. Those findings are supported by the evidence. [Pet. App. 13a.]

The Minnesota Supreme Court denied the petitioner's request to review the Minnesota Court of Appeals' decision. Pet. App. 1a.

ARGUMENT

The petitioner's claim that in two respects the Minnesota rules governing the fair share fee notice that unions must provide to fee payers in that State do not meet the constitutional requirements stated in *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986), is insubstantial.

Thus the *certiorari* petition boils down to a request to review the determination by the Minnesota Court of Appeals that the evidence in the record provides proper support for two factual findings by the Minnesota Bureau of Mediation Services.[1] This Court, of course, does *not* sit to review such factual determinations.

This *certiorari* petition should therefore be denied.

(1) Contrary to petitioner's contention, Minnesota's post-*Hudson* notice rule is plainly in complete compliance with *Hudson's* requirement that the union give "an adequate explanation of the basis for the fee," 475 U.S. at 310. The Minnesota Bureau of Mediation Services has specified that the rule "requires a union to identify ex-

---

[1] Those findings are: (i) that the October 1986 fair share fee notice sent by Council 65 to employees paying fair share fees contained sufficient information to permit the employee to make an informed challenge to the amount of the fee; and (ii) that the AFSCME International and Local Unions with which Council 65 is affiliated provide sufficient collective bargaining services to justify including a portion of the fair share fees remitted to those organizations by Council 65 in the amount charged to fair share fee payers. *See* pp. 5-6 *supra*.

penditures for collective bargaining and contract administration." Pet. App. 8a. Thus, the Minnesota rule defines the union expenses that may constitutionally be charged to fee payers—and which must therefore be identified in the union's notice to fee payers—in a way that tracks this Court's *Hudson* opinion: "The objective must be to devise a way of preventing compulsory subsidization of ideological activity by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of a collective-bargaining activities", 475 U.S. at 302, quoting *Abood v. Detroit Board of Education*, 431 U.S. 209, 237 (1977).

(2) Petitioner's claim that it is unconstitutional for a state to permit a local union acting as an exclusive collective bargaining representative to include in the amounts chargeable to objecting fee payers any portion of the local's affiliation payments to related labor organizations is equally wrong.

"A local union [acting as an exclusive bargaining representative] may seek to affiliate with a larger organization for a variety of reasons. The larger organization may [for example] provide bargaining expertise or financial support, or may compensate for a lack of leadership within the local union." *NLRB v. Financial Institution Employees*, 475 U.S. 192, 199 n.5 (1986). These advantages to a local union from affiliation with a larger labor organization are directly related to meeting the local's collective bargaining responsibilities for which "[t]he services of lawyers, expert negotiators, economists, and a general research staff, as well as general administrative personnel, may be required." *Abood v. Detroit Board of Education, supra*, 431 U.S. at 221. It is for precisely such reasons that the overwhelming majority of local unions that act as exclusive bargaining representatives are affiliated with larger labor organizations.

That is the situation here. As the Minnesota court stated: "AFSCME [is] an integrated organization and therefore could appropriately include in the calculation of

fair share fees payments of other levels of its organization." Pet. App. 13a. Where that is true, petitioner's formalistic argument that objecting fee payers should *not* have to pay their proportionate share of the "integrated organization's" collective bargaining and contract administration expenses—but *only* the fee payer's proportionate share of such expenses directly incurred by the local union —is contrary to the governing law. As just noted, *Hudson* makes it clear that the Constitution does *not* "restrict[] the Union's ability to require every employee to contribute to the cost of collective-bargaining activities." 475 U.S. at 302.

Indeed, in *Hudson*, the local union acting as the fee payers' exclusive bargaining representative was affiliated with, and made affiliation payments to, both a state and a national labor organization. 475 U.S. at 298. With regard to these payments, the Court stated that the notice to fee payers should either show "that none of [the payments] was used to subsidize activities for which nonmembers may not be charged, or [provide] an explanation of the share that was so used". 475 U.S. at 307 n.18. If, as petitioner claims, all such affiliation payments are *not* chargeable to objecting fee payers as a matter of law there would be no point in requiring an explanation of the use to which the payments were put.

Not surprisingly, given the foregoing, the petitioner cites no decision accepting his theory, and we know of no such decision.

3. Assuming for the moment that the point is germane to the consideration of the *certiorari* petition, *but see* p. 6, *supra*, we note that there is nothing to indicate that the court below erred in determining that there is adequate evidence to support the administrative fact findings the petitioner attacks.

Council 65's October 6, 1986 notice contained the Council's financial statement for 1985 with each major ex-

pense category broken down into a chargeable and a non-chargeable component. Pet. App. 50a. In addition, the notice contained financial statements from the affiliated AFSCME International and Local Unions showing which of their expenditures were treated as chargeable in determining the fee and which were not. Pet. App. 51a-52a. This information, as the Minnesota agencies and courts properly concluded, is plainly sufficient for a fee payer to "gauge the propriety of the union's fee," *Chicago Teachers Union v. Hudson*, *supra*, 475 U.S. at 306. *See also Gilpin v. AFSCME*, 875 F.2d 1310, 1316 (7th Cir. 1989).

Nor does petitioner provide any reason to doubt the determination of the court below that adequate evidence supports the Bureau's finding—made on an extensive record compiled during a three-day hearing—that the AFSCME International and Local Unions to which Council 65 makes affiliation payments "provide services to the Council in fulfilling its collective bargaining and contract administration responsibilities." Pet. App. 36a; *see also id.* 13a.

CONCLUSION

The petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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and DEMPSEY
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Supreme Court, U.S.
FILED
AUG 18 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-70

IN THE

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CARTER T. G. KUEHN,

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v.

COUNCIL NO. 65, AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MINNESOTA

BRIEF IN OPPOSITION OF RESPONDENT PUBLIC EMPLOYMENT RELATIONS BOARD

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224-7631 — Review Publishing Co., 287 E. 6th St., St. Paul, Minn. 55101 — 224-7631

QUESTIONS PRESENTED FOR REVIEW

I. Does a notice of fair share fee assessment that details expenditures categorized as chargeable and non-chargeable to the fair share payor satisfy the requirements of *Chicago Teacher's Union, Local No. 1 v. Hudson* that the information given be sufficient for the payor to gauge the propriety of the assessment?

II. Does the inclusion of per capita tax payments of affiliated organizations in petitioner's fair share fee assessment violate his rights under the First and Fourteenth Amendments to the Constitution of the United States where the courts below have found that these affiliated organizations provide services to the exclusive representative in its collective bargaining and contract administration responsibilities?

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IN THE

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CARTER T. G. KUEHN,

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Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE COURT OF APPEALS OF MINNESOTA

BRIEF IN OPPOSITION OF RESPONDENT PUBLIC EMPLOYMENT RELATIONS BOARD

Respondent, Minnesota Public Employment Relations Board, respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the Minnesota Court of Appeals' decision in this case. That opinion is reproduced in Appendix B to the petition and is reported at 435 N.W.2d 130 (Minn. Ct. App. 1989).

STATEMENT OF THE CASE

This case arises from a challenge filed by Petitioner Kuehn to the procedures surrounding a fair share fee assessment. A "fair share fee" is a fee that a union, certified to meet and negotiate with the employer on behalf of all employees in the appropriate unit, may charge employees who are not members of the union but who benefit from the services rendered by the union. Kuehn is a non-union employee of Crow Wing County, Minnesota, and a member of the collective bargaining unit for which Respondent American Federation of State, County and Municipal Employees, Council 65 ("AFSCME Council 65") is the exclusive representative.

In August 1986, Kuehn was notified of a fair share fee assessment by AFSCME Council 65 pursuant to Minn. Stat. § 179A.06, subd. 3 (1986). (Petition, Appendix E.) On October 6, 1986, AFSCME Council 65 sent Kuehn a second, amended notice of fair share fee assessment which included detailed financial data consisting of a breakdown of expenditures categorized as chargeable and non-chargeable to the fair share payor. It is this second notice of assessment which forms the basis of Kuehn's petition.

Minnesota Statutes § 179A.06, subd. 3 requires a union to provide advance, written notice of a fair share fee assessment. The contents of this notice are prescribed in Minn. Rules, pt. 5510.1410 (1989), which was revised soon after this Court's decision in *Chicago Teacher's Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986) and which incorporates the requirements contained in that opinion. (PERB, Appendix A-1.)

Unhappy with the assessment made by AFSCME Council 65, Kuehn filed a formal challenge to the assessment with the Bureau of Mediation Services ("BMS"). The BMS is a state agency authorized by statute to hear and decide all issues in a

fair share fee challenge. Minn. Stat. § 179A.04, subd. 1(e) (1988). (PERB, Appendix A-2.) Specifically, Kuehn complained that the August and October notices of the fair share fee assessment were insufficient, making it impossible for him to gauge the appropriateness of the assessed fair share fee. The BMS entertained Kuehn's challenge at several evidentiary hearings. On December 4, 1987, the BMS determined that the August 1986 notice of assessment was insufficient and ordered AFSCME Council 65 to refund to Kuehn any deductions made prior to the October 6, 1986, notice. The BMS found that the October notice comported with all statutory and rule requirements and constituted adequate notice. Accordingly, it held that assessments made after this second notice were proper. (Petition, Appendix D.)

Kuehn appealed the BMS decision to the Public Employment Relations Board ("PERB"). PERB is the state agency authorized to hear appeals from BMS decisions relating to fair share fee challenges. Minn. Stat. § 179A.05, subd. 4(c) (1988). (PERB, Appendix A-3.) At the PERB hearing on the matter, Kuehn again challenged the procedures surrounding the notices of fair share fee assessment, but framed this issue in constitutional terms. Kuehn claimed that the union's notice procedures constituted a violation of his First and Fourteenth Amendment rights under the United States Constitution. Following this hearing, PERB affirmed BMS's decision, specifically finding that the October 6, 1986, notice of fair share fee assessment was adequate. (Petition, Appendix C.)

Still dissatisfied, Kuehn brought his case to the Minnesota Court of Appeals by writ of certiorari. The court considered Kuehn's constitutional challenges. On January 23, 1989, following briefing and oral argument, the court of appeals affirmed PERB's decision regarding the adequacy of the October

6, 1986, notice of fair share fee assessment and determined that Minn. Stat. § 179A.06, subd. 3 (1986) did not violate a fair share fee payor's First and Fourteenth Amendment rights under the United States Constitution, either on its face or as applied by the BMS and PERB. The court of appeals also held that organizations affiliated with AFSCME Council 65 may assess fair share fees pursuant to Minn. Stat. § 179A.06, subd. 3. The Minnesota Supreme Court denied Kuehn's Petition for Review of the Decision of the Court of Appeals on April 18, 1989. (Petition, Appendix A.)

REASONS FOR DENYING PETITION FOR WRIT OF CERTIORARI

The Petition for Writ of Certiorari should be denied because petitioner has failed to show that there are "special and important reasons" for this Court to grant discretionary review as mandated by Supreme Court Rule 17.

THE MINNESOTA COURT OF APPEALS' DECISION IN THIS CASE DOES NOT CONFLICT WITH THIS COURT'S DECISION IN *CHICAGO TEACHER'S UNION, LOCAL NO. 1 V. HUDSON.*

Rule 17, subd. 1(c) of the Supreme Court Rules provides that one basis for the grant of certiorari is the existence of a conflict between a decision by a state court and an applicable decision of this Court. In order to demonstrate such a conflict, a petitioner must do more than allege the possibility of one. Instead, a grant of certiorari is justified only by a direct and apparent conflict. No such conflict exists here.

The basis for Kuehn's petition is a perceived conflict between the notice requirement criteria enunciated in *Chicago Teacher's Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986)

and that applied by the Minnesota Court of Appeals in examining the notice afforded Kuehn by AFSCME Council 65. Prior decisions of this Court have firmly established the constitutionality of a fair share fee assessment. *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977); *International Association of Machinists v. Street*, 367 U.S. 740 (1961); *Railway Employees' Department v. Hanson*, 351 U.S. 225 (1956). More recently, this Court set out the procedural safeguards necessary to protect a non-union employee's constitutional rights incident to the imposition of a fair share fee assessment in its decision in *Hudson*. The *Hudson* decision established the general principle that potential objectors to a fair share fee assessment must be given sufficient information so as to enable them to gauge the propriety of the union's assessment. *Hudson*, 475 U.S. at 307. Significantly, this Court did not prescribe a rigid formula to meet this requirement. Rather, *Hudson* directs that "basic considerations of fairness" should determine the notice requirement. The decision below presents no conflict with these fundamental principles established in *Hudson*. Attempting to manufacture conflict where none exists, petitioner imposes on *Hudson* a procedurally oppressive interpretation that it cannot logically support.

Relying on *dicta* found in a footnote in *Hudson*, Kuehn first argues that the fair share fee notice in this case is deficient because it lacks an independent auditor's verification of the accompanying financial data. This broad assertion is factually imprecise and legally incorrect. The financial statements provided by AFSCME Council 65, as well as those of AFSCME International, are audited financial statements. The financial data of AFSCME Local 65 represents direct statements from its records. While post-*Hudson* authority rejects a fair share fee notice predicated solely on a union's determination of chargeable expenses, it does not necessarily require an

independent auditor's verification of every financial statement. Nor does *Hudson* enunciate such a rule. Kuehn's argument is based on a footnote in the *Hudson* decision which declares a preference for audited financial data. This footnote, however, is merely dicta and as such does not create a conflict of law. Even if a footnote could form the basis for a conflict, this one does not. This footnote only suggests one method of accomplishing the broad principles of fairness and disclosure enunciated in the decision.

In *Andrews v. Education Association of Cheshire*, 829 F.2d 335 (2d Cir. 1987), non-union employees challenged the procedures used by the union in computing their fair share fee. The employees asserted that these procedures were constitutionally deficient because an independent auditor did not verify the financial information that the unions use to classify expenses into the various categories of expenditures as required by *Hudson*. In examining this issue, the court determined that the employees' reading of *Hudson* was overly broad. The court found that *Hudson* required only that the usual function of an auditor be fulfilled and defined that function as an assurance of legitimized expenditures. The *Andrews* court concluded that the union's current procedures supplied the necessary assurance. In the instant matter, the required procedural assurance of legitimized expenditures was supplied to Kuehn through financial data detailing categorized expenses and through extensive post-assessment hearings held by both the BMS and PERB. For Kuehn to suggest that further procedural safeguards are necessary is absurd and contrary to the principles enunciated in *Hudson*.

The *Hudson* decision expressly reaffirms the principle first stated in *Railway Clerks v. Allen*, 373 U.S. 113, 122 (1963), that practicalities may dictate a lack of absolute precision in calculating the fair share fee of non-members. Quoted in

Hudson, 475 U.S. at 307, n. 18; *Abood v. Detroit Board of Education*, 431 U.S. 209, 239-240, n. 40 (1977). This moderating principle is the framework for *Hudson's* constitutional analysis of the procedures surrounding the fair share fee notice. As evidenced by its repeated use of qualified phrases such as "[*B*]*asic* considerations of fairness," "*sufficient* information," and "*adequate* disclosure," *Hudson* implicitly rejects the strict requirements Kuehn attempts to impose on the notice requirement. *Hudson*, 475 U.S. at 307 (emphasis added). Accordingly, the Minnesota Court of Appeals correctly determined the financial data supplied by AFSCME Council 65 to be sufficient to meet the *Hudson* criteria.

Kuehn also posits that the financial statements included in AFSCME Council 65's notice are constitutionally deficient due to their lack of sufficient definition. Specifically, Kuehn asserts that *Hudson* requires a union to identify and define with particularity the specific union activities that constitute the categorized expenditures listed in its financial data and to provide specific information about the scientific methodology used in its cost ascertainment and allocation. This interpretation of *Hudson's* requirements stretches that decision beyond its logical limits. Nowhere does *Hudson* require this level of detail in its notice requirements. Instead, *Hudson* enunciates a need only for "sufficient information to gauge the propriety of the union's fee." Moreover, it specifically rejects a need for the union to provide an "exhaustive and detailed list of all of its expenditures." *Hudson*, 475 U.S. at 307, n. 18.

It is important to note the factual distinctions between the *Hudson* case and the instant matter. The *Hudson* notice was devoid of any listing of the union's chargeable expenses. The dissenting non-member was "left in the dark about the source of the agency fee." *Hudson*, 475 U.S. at 306. In contrast to that situation, the assessment notice afforded Kuehn by AFSCME

Council 65 detailed the major categories of expenditures, both chargeable and non-chargeable to the non-union employee. Thus, Kuehn was procedurally protected in the very manner envisioned by the *Hudson* Court. He was given all the necessary information by which "to gauge the propriety of the union's fee." *Hudson*, 475 U.S. at 306. Far from deliberately creating a conflict with the *Hudson* decision, the Minnesota Court of Appeals has written a well-reasoned opinion that incorporates and upholds the broad principles *Hudson* establishes. Kuehn's attempt to manufacture a conflict where none legitimately occurs falls flat in light of the Minnesota Court of Appeals' thoughtful response to the *Hudson* opinion.

Kuehn's final argument is that his First and Fourteenth Amendment rights under the United States Constitution have been violated due to the inclusion of per capita tax payments to affiliated organizations in his fair share fee assessment. While Kuehn cloaks his argument in constitutional terms, it is merely a factual issue already decided by the Minnesota Court of Appeals based on the findings of the BMS which were supported by the evidence and affirmed by PERB. The BMS specifically found that the organizational bodies to which per capita taxes were paid provided services to AFSCME Council 65 by aiding in its collective bargaining and contract administration responsibilities. (Petition, Appendix D, p. 36a.) Not only does the record establish the integrated nature of these organizations and, thus, the propriety of the per capita tax payments, but relevant caselaw supports this inclusion as well. In *Tierney v. City of Toledo*, 824 F.2d 1497, 1503 (6th Cir. 1987), the court held that the union's notice of fair share fee must include an accounting of payments to the affiliated state and national labor organizations. This finding implicitly recognizes the legitimacy of such inclusions under the circumstances of that case. A factual determination by this Court on

this issue will not decide an important question of federal law having precedential value. Instead, this issue is fact specific and not conducive to the establishment of a broad principle of law having wide application in a variety of cases.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari filed by Petitioner Kuehn should be denied.

Respectfully submitted,

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APPENDIX

Minn. Rules pt. 5510.1410

5510.1410 FAIR SHARE FEE REQUIREMENTS.

Subpart 1. Advance notice of fair share fee assessment. The exclusive representative must provide written notice of the amount of the fair share fee assessment to the commissioner, the employer, and each employee assessed: upon initial implementation of the fair share fee assessment; to employees hired after the original notice has been issued; and upon a change in the amount of the fair share fee assessment. The notice must contain:

A. the name, address, and telephone number of the exclusive representative;

B. the amount of the regular dues of the exclusive representative;

C. the amount of the fair share fee assessment;

D. sufficient information to identify expenditures for benefits available only to members of the exclusive representative and sufficient information to identify expenditures for collective bargaining and contract administration services that have been provided for bargaining unit employees without regard to membership status;

E. the bureau's current mailing address; and

F. a statement as follows: "An employee may challenge this assessment by filing a challenge with the Bureau of Mediation Services within 30 calendar days after receipt of this notice. The challenge must specify those portions of the assessment being contested and the reasons therefor, and copies of the challenge must be sent to your employer and this organization. The Public Employment Labor Relations Act requires a fee for filing challenges. Forms for challenges and

a copy of the rules governing them are available from the bureau without charge."

Subp. 2. Employer provided information. Unless an alternate method of fair share notice procedure has been requested and approved by the commissioner, the employer shall provide to the exclusive representative the name, home mailing address, and social security number or other necessary payroll deduction information for all employees in the appropriate unit. Questions of necessary payroll deduction information shall be determined by the commissioner.

Subp. 3. Mailing notice. Unless an alternate method of fair share notice procedure has been requested and approved by the commissioner, the notice of the fair share fee assessment shall be mailed by the exclusive representative to the employee's last known home mailing address provided by the employer.

Subp. 4. Assessment. On the effective day of the fair share fee assessment and thereafter, the amount of the assessment shall be deducted by the employer from the pay of the employee. The amounts deducted must be held in escrow by the employer and not remitted to the exclusive representative for a period of 30 calendar days from the date notice is provided under subpart 1.

If at the end of the 30-day period an employee has not challenged the fair share fee assessment, assessments shall be remitted to the exclusive representative without the need for escrow by the employer.

If an employee challenges the fair share fee assessment, the assessment for that employee shall continue to be deducted, but must be held in escrow by the employer until otherwise ordered by the commissioner.

Statutory Authority: *MS s 179A.04 subd 3 cl (f)*

History: *9 SR 735; 11 SR 669; L 1987 c 186 s 15*

Minn Stat. § 179A.04

179A.04 COMMISSIONER'S POWER, AUTHORITY, AND DUTIES.

Subdivision 1. Petitions. The commissioner shall accept and investigate all petitions for:

(a) certification or decertification as the exclusive representative of an appropriate unit;

(b) mediation services;

(c) any election or other voting procedures provided for in sections 179A.01 to 179A.25;

(d) certification to the board of arbitration; and

(e) fair share fee challenges, upon the receipt of a filing fee. The commissioner shall hear and decide all issues in a fair share fee challenge.

Subd. 2. Unit determination. The commissioner shall determine appropriate units, under the criteria of section 179A.09.

Subd. 3. Other duties. The commissioner shall:

(a) provide mediation services as requested by the parties until the parties reach agreement. The commissioner may continue to assist parties after they have submitted their final positions for interest arbitration;

(b) issue notices, subpoenas, and orders required by law to carry out duties under sections 179A.01 to 179A.25;

(c) certify to the board items of dispute between parties subject to action of the board under section 179A.16;

(d) assist the parties in formulating petitions, notices, and other papers required to be filed with the commissioner or the board;

(e) certify the final results of any election or other voting procedure conducted under sections 179A.01 to 179A.25;

(f) adopt rules regulating the forms of petitions, notices, and orders; and the conduct of hearings and elections;

(g) receive, catalogue, and file all orders and decisions of the board, all decisions of arbitration panels authorized by sections 179A.01 to 179A.25, all grievance arbitration decisions, and the commissioner's orders and decisions. All orders and decisions catalogued and filed shall be readily available to the public;

(h) adopt, subject to chapter 14, a grievance procedure to fulfill the purposes of section 179A.20, subdivision 4. The grievance procedure shall not provide for the services of the bureau of mediation services. The grievance procedure shall be available to any employee in a unit not covered by a contractual grievance procedure;

(i) conduct elections;

(j) maintain a schedule of state employee classifications or positions assigned to each unit established in section 179A.10, subdivision 2;

(k) collect such fees as are established by rule for empanelment of persons on the labor arbitrator roster maintained by the commissioner or in conjunction with fair share fee challenges.

Subd. 4. Location of hearings. Hearings and mediation meetings authorized by this section shall be held at a time and place determined by the commissioner, but, whenever practical, a hearing shall be held in the general geographic area where the question has arisen or exists.

History: *1984 c 462 s 5; 1985 c 157 s 1; 1987 c 186 s 15*

Minn. Stat. § 179A.05

179A.05 PUBLIC EMPLOYMENT RELATIONS BOARD; POWERS AND DUTIES.

Subdivision 1. Membership. The public employment relations board is established with five members appointed by the governor. Two members shall be representative of public em-

ployees; two shall be representative of public employers; and one shall be representative of the public at large. Public employers and employee organizations representing public employees may submit for consideration names of persons representing their interests. The board shall select one of its members to serve as chair for a term beginning May 1 each year.

Subd. 2. Terms, compensation. The membership terms, compensation, removal of members, and filling of vacancies on the board shall be as provided in section 15.0575.

Subd. 3. Rules, meetings. The board shall adopt rules governing its procedure and shall hold meetings as prescribed in those rules. The chair shall preside at meetings of the board.

Subd. 4. Other powers. In addition to the other powers and duties given it by law, the board has the following powers and duties:

(a) to hear and decide appeals from determinations of the commissioner relating to "supervisory employee," "confidential employee," "essential employee," or "professional employee";

(b) to hear and decide appeals from determinations of the commissioner relating to the appropriateness of a unit;

(c) to hear and decide on the record, determinations of the commissioner relating to a fair share fee challenge;

(d) collect such fees as are established by rule for empanelment of persons on the labor arbitrator roster maintained by the board.

Subd. 5. Appeals. The board shall adopt rules under chapter 14 governing the presentation of issues and the taking of appeals relating to matters included in subdivision 4. All issues and appeals presented to the board shall be determined upon the record established by the commissioner, except that the board may request additional evidence when necessary or helpful.

Subd. 6. List of arbitrators. The board shall maintain a list of names of arbitrators qualified by experience and training in the field of labor management negotiations and arbitration. Names on the list may be selected and removed at any time by a majority of the board. In maintaining the list the board shall, to the maximum extent possible, select persons from varying geographical areas of the state.

Subd. 7. Arbitration. The board shall provide the parties with a list of arbitrators under section 179A.16, subdivision 4.

History: *1984 c 462 s 6; 1985 c 157 s 2; 1986 c 444; 1987 c 186 s 15*

FILED
AUG 25 1989
JOSEPH F. SPANIOL
CLERK

No. 89-70

IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

CARTER T.G. KUEHN,

Petitioner,

v.

COUNCIL NO. 65, AMERICAN FEDERATION OF STATE, COUNTY, & MUNICIPAL EMPLOYEES, *et alia*,

Respondents.

On petition for a writ of certiorari to the Court of Appeals of Minnesota

PETITIONER'S BRIEF IN REPLY TO OPPOSITION OF RESPONDENT COUNCIL 65, AFSCME

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PETITIONER'S BRIEF IN REPLY TO OPPOSITION OF RESPONDENT COUNCIL 65, AFSCME

INTRODUCTION

Petitioner Carter T.G. Kuehn hereby replies to the brief in opposition of respondent Council 65, AFSCME.

ARGUMENT

Council 65's basic thesis is that Kuehn is requesting this Court to "review * * * two factual findings by the

Minnesota Bureau of Mediation Services".[1] Nothing could be further from the truth. For Kuehn's position raises only questions of *law*, against a background of *undisputed facts*.

I. As to Council 65's notice, the record is absolutely clear—and Council 65 does not deny—that the notice:

* contains *no* "verification by an independent auditor" or "certified public accountant's verified breakdown of expenditures", as required by *Hudson*;[2]

* sets out *no* list of the activities that Council 65 claims constitute its "collective-bargaining" services to Kuehn, as required by *Hudson*;[3]

* provides *no* definitions of "collective bargaining" by which Kuehn can "gauge the propriety of the union's fee";[4] and

* explains *nothing* about the methodology of cost-accounting Council 65 used to arrive at the bare figure of the "fair-share fee".

The Minnesota agencies and Court of Appeals did *not* find as "*facts*" that these demerits did not exist in the notice. To the contrary: They held that the notice was valid, as a matter of Minnesota *law*, notwithstanding the *unquestionable factual absence* in the notice of an accountant's "verification", a list of Council 65's purported

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[1]Brief in Opposition at 6.

[2]475 U.S. 292, 307 n.18, 310 (1986).

[3]*Id.* at 306-07 ("identifying the expenditures for collective bargaining").

[4]*Id.* at 306.

"collective-bargaining" services, definitions of "collective bargaining", and any indication of the union's accounting methodology.

If these facts do not evidence a patent violation of *Hudson*, nothing does.

II. As to the issue of "*per capita* payments", Council 65 misrepresents Kuehn's contention. Kuehn does *not* claim that

> it is unconstitutional for a state to permit a union acting as an exclusive collective bargaining representative to include in the amounts chargeable to objecting fee payers any portion of the local's affiliation payments to related labor organizations * * * .[5]

Rather, Kuehn admits that such payments may be made —*if* the exclusive representative establishes that the "affiliates" have, in fact, provided legitimate "collective-bargaining" services to *Kuehn's* bargaining-unit. In this case, however, no such *factual* proof was made (or even offered), the Minnesota agencies and the Court of Appeals relying instead on the *conclusive legal presumption* that the purportedly "integrated" nature of Council 65 and its affiliates obviated the need for a factual demonstration that the affiliates had provided services beneficial *to Kuehn*.

Council 65's contention that *Hudson* sanctioned such a presumption is ludicrous.[6] *Hudson* requires that an exclusive representative supply information in its "fair-share" notice justifying payments to its affiliates, by showing "that none of [the payments] was used to

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[5]Brief in Opposition at 7.

[6]*Id.* at 8.

subsidize activities for which nonmembers may not be charged".[7] But nonmembers may not be charged for activities which do not benefit them.[8] Therefore, the notice must show *how* the purportedly chargeable costs of affiliates relate to the delivery of "actual benefits" to each nonmember—benefits that must, in the nature of things, accrue to that nonmember *in his own bargaining-unit*.[9] Neither Council 65's notice itself, nor any evidence presented in the so-called "extensive record compiled during a three-day hearing",[10] provides the factual, legal, logical, or even minimally rational nexus between the "*per capita* taxes" Council 65 included in its "fair-share fee" and the delivery *to Kuehn* of any "actually beneficial" services by the recipients of those "taxes".

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[7]475 U.S. at 307 n.18.

[8]The union must "identif[y] the expenditures for collective bargaining * * * that had been provided *for the benefit of nonmembers* * * * and for which nonmembers * * * can fairly be charged a fee". *Id.* at 306-07 (emphasis supplied).

[9]*See* Communications Workers of America v. Beck, 108 S. Ct. 2641, 2655, 2656 (1988) (National Labor Relations Act) (purpose of "agency-fee" arrangements is to "ensur[e] that nonmembers who obtain the benefits of union representation can be made to pay for them", and to "enable unions to charge nonmembers only for those activities that actually benefit them").

[10]Brief in Opposition at 9.

CONCLUSION

For the foregoing reasons, this Court should reject Council 65's opposition, and grant the petition.

Respectfully submitted,

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Respondents.

PETITIONER'S REPLY TO BRIEF IN OPPOSITION OF RESPONDENT MINNESOTA PUBLIC EMPLOYMENT RELATIONS BOARD

INTRODUCTION

Petitioner Carter T.G. Kuehn hereby replies to the brief in opposition of respondent Minnesota Public Employment Relations Board (PERB).

ARGUMENT

PERB's arguments highlight the need for this Court to grant the petition.

1. PERB first offers the truly stupefying interpretation that *Hudson's* requirement that a "fair-share-fee" notice contain "verification by an independent auditor"[1] is merely "dicta".[2] In fact, *Hudson* "h[e]ld * * * that the constitutional requirements for the Union's collection of agency fees include an adequate explanation of the basis for the fee".[3] It held that what the union there had done "was not an adequate disclosure", and stated that "adequate disclosure surely would include * * * verification by an independent auditor".[4] So, for PERB to characterize *Hudson's* "verification"-requirement as "dicta" is disingenuous. Of course the motive for PERB's pretense is its knowledge that Minnesota does not enforce a "verification"-requirement in its "fair-share" scheme—and that, therefore, the scheme is unanswerably unconstitutional under *Hudson*.

2. PERB says that the "financial statements" of Council 65 and AFSCME were audited, and suggests that that should be enough.[5] *Hudson*, however, requires that the breakdown of a union's expenditures into the categories "collective bargaining" (CB) and "noncollective bargaining" (NCB) be audited. Nonunion employees are not interested, after all, in being assured that a union spent $X on "salaries", for example. Rather, they want to know how much of X went to "salaries" paid to employees who performed specific CB activities. And the over-

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[1]475 U.S. at 307 n.18.

[2]Brief in Opposition at 5, 6.

[3]475 U.S. at 310.

[4]*Id.* at 307 & n.18.

[5]Brief in Opposition at 5-6. PERB admits, though, that the Local's "financial data" were unaudited altogether.

whelming weight of authority in the lower courts so recognizes.[6]

PERB pretends that *Andrews* is contra.[7] *Andrews*, however, dealt not with "verification" of CB versus NCB costs, but with whether the independent auditor was required to make the legal determinations of what activities were CB or NCB.[8] That issue is not here for review.

3. PERB then says that *Hudson's* "qualified" terminology of "sufficient information" and "adequate disclosure" implies something approaching a de minimis level.[9] Logic dictates otherwise: "Sufficiency" and "adequacy" import a quantity and quality meeting rational standards—not just some, of any kind; but enough of a certain kind.

4. PERB complains that a union should not have to "identify and define with particularity the specific * * * activities that constitute the categorized expenditures listed in its financial statements".[10] Why not? Without the union's expenditures being arranged by categories of activities described functionally in a manner that relates

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[6]*E.g.*, Tierney v. City of Toledo, 824 F.2d 1497, 1503-04, 1506 (6th Cir. 1987); Ellis v. Western Airlines, Inc., 652 F. Supp. 938, 941 (S.D. Cal. 1986); Gilpin v. AFSCME, 643 F. Supp. 733, 737 (C.D. Ill. 1986); Lehnert v. Ferris Faculty Ass'n-MEA-NEA, 643 F. Supp. 1306, 1332 (W.D. Mich. 1986); McGlumphy v. Fraternal Order of Police, 633 F. Supp. 1074, 1082 (N.D. Ohio 1986).

[7]Brief in Opposition at 6, citing Andrews v. Education Ass'n of Cheshire, 829 F.2d 335 (2d Cir. 1987).

[8]829 F.2d at 340, so construed in Ping v. NEA, 870 F.2d 1369, 1374 (7th Cir. 1989).

[9]Brief in Opposition at 6-7.

[10]*Id.* at 7.

them intelligibly to CB, how can nonunion employees "gauge the propriety of the union's fee"?[11]

In effect, by merely listing line-item entries from their normal institutional budgets with appended percentages that they claim represent CB or NCB costs, the unions have resuscitated in a new body the so-called "residuum theory" that *Hudson* summarily executed.[12] The *Hudson* unions took their complete line-item budgets, identified certain supposedly NCB activities, estimated the costs of those activities, and presented this total cost as a percentage of their budgets.[13] Here, Council 65 and its affiliates have done the same thing, operationally, for each line-item individually. And the overall result is the same, too: "An acknowledgment that [Kuehn] would not be required to pay any part of", for example, $3,411 out of $9,222 for Council 65's otherwise undefined and unexplained "legislative expense", "[is] not an adequate disclosure of the reasons why [he was] required to pay [his]

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[11]Hudson, 475 U.S. at 306. For instance, what of significance does Kuehn learn from Council 65's disclosure that it expended $392,645 for "salaries", and considers that expenditure 100% chargeable as CB? Appendix to Petition at 50a. Does Kuehn know what was done, by whom, when, where, why, or for whose benefit? Similarly, what does the Local disclose when it claims that $9,336.21 (nearly 100%) of its expenses were devoted to "union administration"? *Id.* at 52a.

[12]475 U.S. at 306-07.

[13]*Id.* at 295.

share of" the $5,811 charged.[14]

5. Finally, PERB pretends that "[t]he BMS specifically found that the organizational bodies to which per capita taxes were paid provided services to * * * Council 65 by aiding in its collective bargaining and contract administration responsibilities".[15] The record, however, contains no such evidence. The supposed "finding" of the BMS is, in actuality, merely the application of its "integration" theory, which illegally substitutes a general conclusive presumption for specific facts.

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[14]*Id.* at 307 (footnote omitted). The example is taken from Appendix to Petition at 50a.

If it were sufficient simply to say that, for example, $5,231,228 out of $5,247,796 of AFSCME International's "field services" line-item is chargeable to Kuehn, then why would it not be sufficient to say that $16,568 is not chargeable? Of course, the two statements amount to the same thing. Yet, if so, why is not the line-item presentation the unions used simply the "residuum theory" in a new guise: *i.e.*, a "residuum" is presented for each line-item, instead of for the line-items taken as a whole. But, then, various "residua" are summed, adding up to the same result as if a collective "residuum" had been calculated in the first place. All that nonunion employees such as Kuehn receive from this "massaging" of the data is a series of "*Hudson* 5%s"—that is, a series of admissions of what the unions have not spent on CB, without statements of "the reasons why" what they claim to have spent on CB is legitimate.

[15]Brief in Opposition at 8, citing Appendix to Petition at 36a.

CONCLUSION

For the foregoing reasons, this Court should reject PERB's opposition, and grant the writ.

Respectfully submited,

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